SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

NORTH-EASTERN DIVISION

1948-1951

INDEX

This index is a complete guide to all cases reported in Volume I up to the 31st December, 1951, and previous indices may be destroyed

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ERRATA.

1. Page 308: Line 48—

   For " Mpanza *v.* Zulu, 1947, N.A.C. (T. & N.) 65 " read " Mpanza *v.* Zulu, 1947, N.A.C. (T. & N.) 75 ".

2. Page 309: Line 15—

   For " Mpanza *v.* Zulu, 1947, N.A.C. (T. & N.) 65 ", read " Mpanza *v.* Zulu, 1947, N.A.C. (T. & N.) 75 ".

3. Page 321: in the headnote—

   " Kuzwayo *v.* Khuluse " substitute the word " minor " for miner ".

4. Page 322: Line 18—

   For " Mkwanazi *v.* Zulu, 1938 (N.A.C.) (T. & N.) 285 " read " Mkwanazi *v.* Zulu, 1938 (N.A.C.) (T. & N.) 258 ".

5. Page 352: Cases referred to—

   For " Nqanoyi *v.* Njombeni 1930, N.A.C. (C. & O.) " read " Nqanoyi *v.* Njombeni, 1930, N.A.C. (C. & O.) 13 ".

6. Page 354, Line 42 and Page 355, Line 19—

   For " Matebula *v.* Sitole, 1943 N.A.C. (T. & N.) 58 ", read " Matebula *v.* Sitole, 1943 N.A.C. (T. & N.) 84 ".

7. Page 361, lines 50 and 51 and Page 362, last two lines—

   Delete " Case No. 63/1951 (not yet reported) and substitute " P. 336 ".

8. Page 362, Lines 17 and 18 and Page 363, lines 5 and 6—

   Delete " Case No. 14/1951 (not yet reported) " and substitute " P. 316 ".

9. Page 365, Lines 46 and 62—

   Substitute " Case No. 54/1951 " by P. 346.

G.P.-S.8872—1948-9—500.

DECISIONS

OF THE

NATIVE APPEAL COURT

(North-Eastern Division)

Quarter ending 30th Sept., 1948

Volume I

(Part I)

Printed in the Union of South Africa by the Government Printer, Pretoria

1948

CASE No. 1 OF 1948.

JACKSON MOHLOLA (Appellant) *v.* BENJAMIN MAPHOTO (Respondent).

(N.A.C. Case No. 86/1/48.)

PRETORIA: Monday, 14th June, 1948: Before Steenkamp, President, Liefeldt and King, Members of the Court (North-Eastern Division).

Practice and Procedure—Condonation of late appeal—Postponement to abandon judgment.

Held: After condonation for late noting of appeal is granted, respondent is entitled to postponement of the appeal to enable him to consider abandoning the judgment.

Appeal from the Court of the Native Commissioner, Bochem.

Steenkamp, President (delivering the judgment of the Court):—

Judgment was granted on 21st October, 1947, against the plaintiff (applicant), but the Notice of Appeal, dated 1st April, 1948, was only received by the Clerk of Court on 30th April, 1948.

Plaintiff had no attorney in the Court below and application is now made for condonation of the late noting of appeal. In the supporting affidavit appellant states that on 30th October, 1947, he consulted a firm of Attorneys at Pietersburg (which is over 50 miles distant from Bochem where the case was tried) and he was advised that the matter would be discussed with the Native Commissioner and the advisability of noting an appeal would then be considered. Thereafter he consulted the firm of Attorneys on two more occasions but nothing was done and on 9th March, 1948, he consulted another firm of Attorneys with the result that an appeal has now been noted.

Appellant could have noted an appeal in person and the fact that he was not aware that an appeal had to be noted within any prescribed period is unacceptable. There is, however, a reasonable prospect of appellant succeeding in the appeal and for this reason alone indulgence should be granted.

The application for condonation is accordingly granted and the applicant is ordered to pay costs.

Normally, after condonation is granted, the appellant is called upon to prosecute the appeal on the merits but in this case Counsel for respondent has intimated to the Court that if the indulgence is granted he intends abandoning the judgment.

There was no necessity to abandon the judgment previously for the reason, as pointed out by Counsel, that there is no appeal for consideration by this Court until such time as condonation has been granted.

To afford respondent an opportunity of abandoning the judgment formally in terms of rule 7 of the Native Appeal Court Rules, should he still so desire, hearing of the appeal on the merits is postponed to the next session of this Court, i.e. to the 14th September, 1948.

For Appellant: Mr. Arons of Pretoria.
For Respondent: Mr. Jepson of Pretoria.

CASE No. 2 OF 1948.

FAYIBE MZOBE AND SIDUMU NGCOBO (Appellants) *v.* SHULENI TUSHINI AND OTHERS (Respondents).

(N.A.C. Case No. 35/1/1948.)

DURBAN: Monday, 26th April, 1948. Before Steenkamp, President, Hobson and Craig, Members of the Court (North-Eastern Division).

Judgment delivered on 9/6/1948.

Practice and Procedure—Appeal lodged not less than 28 days before commencement of session—Must be prosecuted at such session. Additional grounds of appeal cannot be filed after expiry of 21 days. Jurisdiction of Native Commissioners' Courts.

Mercantile Law—Deeds Registry Act, 1937—Native Commissioners' Courts have no jurisdiction to order cancellation of title deed.

Held:

(1) That where the Clerk of Court has delayed in forwarding the records to the Registrar in time for the ensuing session, permission must be granted to prosecute the appeal at the following session of the Native Appeal Court.

(2) That additional grounds of appeal cannot be filed after the expiry of 21 days especially as such grounds were not canvassed in the Court below.

(3) That a Native Commissioner's Court has no jurisdiction to order the cancellation of a title deed for the occupation of immovable property in view of sections 6 and 20 of the Deeds Registries Act, 1937.

Appeal from the Court of the Native Commissioner, Port Shepstone.

Steenkamp, President (delivering the judgment of the Court):—

Application is filed for leave to prosecute the appeal during the present session.

The appeal was noted on 9th December, 1947, and should have been prosecuted during the session which commenced at Durban on 26th January, 1948, or application made to this Court for a postponement to the next session. On reference to the original record it is found that the Clerk of the Court only notified the Registrar on the 20th January, 1948, that an appeal had been noted. There is no indication of the date the Registrar received the notice of appeal but on 30th January, 1948, i.e. after the January, 1948, session had been concluded, the Clerk of the Court was advised that the appeal had been set down for hearing on the 26th April, 1948.

The Clerk of the Court did not comply with the provisions of Rule 16 (1) of the Native Commissioner's Court Rules, which reads as follows:—

> " Upon an appeal being noted the Clerk of the Native Commissioner's Court shall immediately notify the Registrar of the Native Appeal Court . . ."

If this provision had been carried out the Registrar would have had ample time to set the case down for the January session and there can be no doubt that the Clerk of Court in delaying to notify the Registrar, is responsible for the appeal not having been prosecuted as required by the Rules.

Counsel for respondent has objected to the application being granted, but, this Court in view of the fact that neither the appellant nor his representative is responsible for the dilatoriness of the Clerk of Court, hereby orders that the appeal be prosecuted during this session.

Attorneys for appellant have filed additional grounds of appeal, dated 9th March, 1948. In *Limine* Counsel for respondent objected to these additional grounds and in his argument he states these should have been raised in the Court below.

Section 22 of the Native Appeal Court rules reads as follows:—

> " In the hearing of an appeal the parties shall be limited to the grounds stated in the notice of appeal . . ."

The only exception is where the appellant is not represented by a legal practitioner and was not so represented in the Court below.

In the case of Nzimande *v.* Funeka, 1938 N.A.C. (T. and N.) 82, this Court in similar circumstances refused to allow additional grounds of appeal and in the refusal remarked to the effect that no doubt if these additional grounds had been embodied in the original notice of appeal the Native Commissioner would have been in a position to deal with them in his reasons for judgment. Moreover in the present case it is observed that the additional grounds are in effect a plea that should have been raised as an issue in the Court below. In these circumstances the application to file the additional grounds of appeal is refused.

Before argument is commenced this Court *mero motu* raised the following legal issues:—

(1) Whether the Native Commissioner had jurisdiction to try the case especially in view of sections 6 and 33 of the Deeds Registries Act, No. 47 of 1937.

(2) Whether defendant No. 2 could consent to judgment on behalf of a minor whose interest in immovable property is affected.

(3) Whether by virtue of section 11 of Act No. 18 of 1936 (Native Trust and Land Act), a Native Commissioner can give an unqualified judgment.

Both Counsel, therefore, intimated to the Court that they are not in a position to argue these legal issues at present and on their suggestion argument is postponed for two days.
28*th April,* 1948.

On resumption of the hearing of the appeal both Counsel are directed to argue on the first legal issue raised by the Court, viz., whether the Native Commissioner had jurisdiction to try the case especially in view of sections 6 and 33 of the Deeds Registries Act, No. 47 of 1937. It is intimated that if this Court holds the view that the Native Commissioner had no jurisdiction then the grounds of appeal and the other legal issues would fall away.

Counsel for respondent urged that as the Registrar of Deeds was not cited as a party in the proceedings, the question of jurisdiction does not arise and a judgment on the merits in favour of the respondents would as between the parties be a valid one and when the Title Deeds are submitted to the Registrar for registration, this officer may or may not act on the judgment of the Court. To carry this contention to its logical conclusion would mean that the Registrar may veto a judgment of the Native Commissioner's Court. Such a state of affairs could never have been contemplated by the legislature. It is a well grounded principle in our legal structure that a judgment should not be an empty shell and a successful litigant is entitled to expect that a judgment in his favour will be carried out and such a judgment may only be treated with impunity if it is found that the Court granting the judgment had no jurisdiction. It, therefore, becomes the duty of a Court when litigation is commenced before it to see whether or not it has jurisdiction.

According to the Deed of Grant filed of record it would appear that in terms of a Proclamation, dated 23rd September, 1889, two Natives by the name of Unyovane and Mantshi purchased a certain piece of land called " Roselands " in extent 428 acres, 1 rood and 38 perches, for the sum of £321. 7s. 4d.

On 2nd December, 1926, this piece of ground was granted, ceded and transferred by the Governor-General of the Union of South Africa in freehold to and on behalf of the two purchasers mentioned. This Deed of Grant was signed by the Secretary for Lands and registered in the office of Registrar of Deeds (Province of Natal), on 10th December, 1926. By that time the two original purchasers were both dead. The position at the present moment is that Unyovane's son and heir Mposwa is also dead and his heir Fayibe defendant No. 1 (Appellant) succeeded to the property as heir. Mantshi's son and grandson are both dead and defendant No. 2, Zwelinyani, a minor, is heir to his great grandfather's portion of the farm Roselands.

Subsequently on the 24th February, 1943, the undivided half share of Unyovane was transferred to his son Mposwa and from Mposwa to Fayibe Mzobe, the appellant. The undivided half share which belonged to the late Mantshi and so registered in his name, has not yet been transferred to his heirs in succession but it is not disputed that Zwelinyane (defendant No. 2), a minor, is the rightful heir to succeed to the property.

It is now alleged in the statement of claim attached to the summons that notwithstanding the fact that according to the Title Deeds the late Mantshi and the late Unyovane were the true owners of the property in undivided shares, the respondents are entitled to have the farm transferred into their joint names and the names of the two defendants by virtue of the fact that the farm was purchased jointly either by the respondents or their fathers and the forbears of the defendants:—

In the prayer the respondents claim an order declaring—

(*a*) that the said farm be transferred into the names of defendants and plaintiffs who shall hold same in trust for the benefit of themselves and plaintiffs together with their descendants;

(*b*) that the defendants be ordered to sign all documents necessary to pass and effect registration of such transfer.

(*c*) alternatively that the Messenger of Court, Port Shepstone, be authorised to execute all documents required in terms of the Deeds Registries Act, No. 47 of 1937, to effect registration of transfer as aforesaid.

The order sought for is in effect a declaration for the cancellation of the original Deed of Grant and subsequent deed of transfer and for substituted documents to be issued embodying the names of the respondents as joint owners.

As will appear hereunder it is necessary to quote section 45 of the Deeds Registries Act, 1918, which reads as follows:—

> " Save as is specially provided in this Act or in any other law, no deed of grant, deed of transfer or certificate of title registered in a deeds registry shall be cancelled by the Registrar except upon an order of the Court."

The Act of 1918 was repealed by Act No. 47 of 1937, and section 45 of the former Act was re-enacted with modification by section 6 of the last-named Act. This section reads as follows:—

> " Save as is otherwise provided in this Act or in any other law, no registered deed of grant, deed of transfer, certificate of title or other deed conferring or conveying title to land or any real right in land other than a mortgage bond and no cession of any registered bond not made as security, shall be cancelled by a Registrar except upon an Order of Court."

In both Acts " Court " or " the Court " is defined to mean the Provincial or Local Division of the Supreme Court having jurisdiction or any judge thereof.

This Court does not overlook the fact that according to section 10 of the Native Administration Act, No. 38 of 1927, a Native Commissioner's Court has jurisdiction in all civil causes and matters between Native and Native. There are certain exceptions but the present case does not fall within the ambit of any of those mentioned. It would appear at first blush that a Native Commissioner has unrestricted jurisdiction apart from the five exceptions if the Native Administration Act is read by itself, but I hold the view that where certain powers are exclusively granted to the Supreme Court by an Act of Parliament then the Native Administration Act concerning jurisdiction must be read subject to what is laid down in any other law affecting not only Europeans but also Natives.

Jurisdiction is conferred on a Magistrate's Court by section 29 of Act No. 32 of 1944. This section reads as follows:—

> " Subject to the provisions of this Act, the Court, in respect of causes of action shall have jurisdiction:—
>
> (*a*) in actions in which is claimed the delivery or transfer of any property, movable or immovable, not exceeding £200 in value;
>
> (*b*), (*c*) and (*d*) . . .
>
> (*e*) in actions other than those already in this section mentioned, where the claim or the value of the matter in dispute does not exceed £200 ".

I have not been able to find any decided cases on paragraph (*a*). It would appear that immovable property not exceeding £200 in value registered in the name of a person may be claimed by another and if he obtains judgment in an Inferior Court the Registrar of Deeds is bound to cancel the title deed and transfer the property into the name of the successful litigant; yet section *six* of the Deeds Registries Act limits the Registrar to do so only on an order from the Supreme Court.

Paragraph (*e*) confers jurisdiction on a Magistrate's Court irrespective of the class of action so long as the amount or value of claim does not exceed £200. There are certain exceptions laid down in section 46 of the Magistrate's Court Act but they are inapplicable in so far as the facts in the present action are concerned. Paragraph (*e*) already referred to can reasonably be compared with section 10 (1) of the Native Administration Act but with this distinction that in the latter the action need not be limited to any amount.

Notwithstanding paragraph (*e*) the Court held in the case of Gluckman *v.* Jagger & Co., 1929 C.P.D. 44, that since there is a procedure under which a wrong decision of the Master in insolvency matters can be set aside, a Magistrate's Court cannot deal with a claim based on the ground that such a decision was erroneous; nor does the defendant's failure to object to the jurisdiction confer such jurisdiction. Section 111 (1) of the Insolvency Act, No. 24 of 1936, is the relevant provision by which an aggrieved person may apply to the Court for an order to set aside the Master's decision. " Court " is defined to mean the Supreme Court.

In the case of Steenkamp *v.* the Master & Steenkamp C.P.D., 8 P.H. F.62, it was decided that a Magistrate's Court has no jurisdiction to correct a decision of the Master under section 68 of Act No. 24 of 1913 (Administration of Estates). owing to the definition of " Court " which is defined in section 2 of the Act as the Supreme Court.

These two cases referred to go to prove that notwithstanding explicit language conferring jurisdiction on an Inferior Court, yet, if in some other Enactment it is mentioned that only the Supreme Court can make an order, the latter Court is the only tribunal to deal with the matter.

In the case of Ntsutwane Booi *v.* Mhlapo, 1934 N.A.C. (C.O.) 35, the plaintiff claimed the cancellation of the transfer of a certain Lot from Noneyi Booi to the defendant. The Court intimated that the point to be decided in that case is whether a Court of a Native Commissioner has notwithstanding its wide powers, jurisdiction to order the cancellation of a transfer of a lot held in a surveyed location. The point was fully considered and the Court came to the conclusion that only a

Court of competent jurisdiction, viz., the Supreme Court can grant an order requiring the Registrar to cancel a transfer of immovable property. In that judgment Barry (President) stated:—

> "If the judgment involved an order upon the parties the Court of Native Commissioner might be deemed to have jurisdiction but even in such an event any order given by such a Court would be subject to the administrative authorities. But in this case the implications are of a wider character and if the Court of Native Commissioner had adjudicated upon the claim for cancellation it would have amounted to an order upon the Registrar of Deeds to cancel a deed and to transfer the lot to some person other than the existing transferee."

In a later case by the same Court decided in 1945 [Zwartbooi *v.* Zwartbooi, 1945 N.A.C. (C.O.) 46], a distinction is drawn between a claim where one party calls on the other for a declaratory order in respect of the ownership of fixed property already registered in the name of the defendant and a claim praying for the cancellation of a transfer of immovable property. It was decided that where the claim is for the cancellation of a title deed the Court of the Native Commissioner has no jurisdiction but if a declaratory order of rights is sought then such Court has jurisdiction.

I find it difficult to draw a distinction between the two cases and cannot agree that a Native Commissioner's Court shall have jurisdiction in the one and not in the other. The words used in a prayer are a matter of choice but the ultimate object in each and every case is that the name of the transferee in the title deed should be substituted by the name of the plaintiff. In other words the deed of transfer should be cancelled and one in favour of the plaintiff issued. To draw a distinction or to attempt to do so is only begging the question and if an order is made that the plaintiff is entitled to the property in question the Registrar may still (and in accordance with Section 6 of the Deeds Registries Act, 1937, which is his Charter, he has no option) refuse to act on the order made by a Court other than the Supreme Court. The issue has then reached a deadlock and as already remarked it could never have been contemplated by the legislature that a judgment made by a Court of law could be vetoed or disregarded by the executive authorities. It therefore follows that a Court either has or has no jurisdiction and if it has jurisdiction to decide the issue between litigants then the administrative or executive authorities may not question the validity of a judgment and are bound to subscribe thereto and lend support in transferring the property in favour of the party in whose favour the Court granted judgment.

In the case of Mpendukane *v.* Mpendukane, 1946 N.A.C. (C.O.) 43, the Court *authorised* the Chief Magistrate of the Transkeian Territories who is the Registrar of Deeds in that area and is bound by Act No. 45 of 1937, to rescind and strike out the allotment of a certain registered allotment in favour of the defendant. One of the members of the Court (Cockcroft M) while agreeing with the judgment delivered on appeal remarks as follows:—

> "While I agree that this Court is entitled to give the judgment it has given, in my opinion it is an empty shell as it is not binding on the Chief Magistrate in his capacity as Registrar of Deeds, because he is not a party to the action and indeed could not have been made a party to the action, having regard to the definition of "Native" in the Native Administration Act.
>
> Even if he considers himself bound, in my opinion, he cannot legally act thereon, because section 6 of the Deeds Registries Act (No. 47 of 1937), provides that he is not entitled to cancel a registered Deed of Grant or other deed conferring title to land without an order of Court. And "Court" in that Act is defined as "the provincial or local division of the Supreme Court, having jurisdiction or any judge thereof."

These remarks can be interpreted as a partial dissention from the judgment of the majority of the Court. I agree with this dictum by the Member of the Court except that I hold the view that no Court of Law may give a judgment in favour of a party and yet hold that the executive authorities are not bound to give effect to that judgment. If the executive authorities are in doubt as to the correct person entitled to obtain title to ground, then only a Court of Law of competent jurisdiction may decide the issue and the executive authorities are then bound to carry out the decision. Nowhere in the Deeds Registries Act is the Registrar of Deeds given executive discretion in connection with cancellations, transfers, etc., of immovable property. Section 6 clearly states that he may only cancel a deed of transfer on an order from the Supreme Court and I hold that he will be exceeding the powers conferred on him if he acts on an order made by an inferior Court.

The Cape and O.F.S. Division of this Court in the case of Sidondi *v.* Sidondi [1939 N.A.C. (C.O.) 2], authorised the Chief Magistrate of the Transkeian Territories in his capacity as Registrar of Deeds to substitute the name of the plaintiff for that of defendant on the title deeds and to amend all other records accordingly but in that case the question of jurisdiction was not raised.

Section 20 of the Deeds Registries Act, 1937, prescribes how transfers shall be executed by the Registrar of Deeds. It is clear from this section that only the owner or a conveyancer authorised by power of attorney may appear before the Registrar *unless an order is made by the Court.*

The Native Appeal Court cases (Cape and O.F.S. Division) quoted above effect the Chief Magistrate, Umtata, who is an executive as well as an administrative officer. In his administration of individual tenure of allotments of land to Natives in the Transkeian Territories he is subject to direction by the Secretary for Native Affairs but this cannot be said of the Registrar of Deeds who in my opinion is not legally empowered to act as an Executive Officer on a decision by an Inferior Court.

I, therefore, hold the view that the Native Commissioner's Court had no jurisdiction to try the dispute. This decision might lead to hardship if the value of the property is slight but it is the function of the legislature to grant relief if it so wishes by amending the law.

It is ordered that the appeal be and is hereby allowed. No order of costs of appeal will be made as the question of jurisdiction was not raised in the Court below or on appeal.

The judgment of the Native Commissioner is altered to read " Summons dismissed with costs."

E. N. Hobson, Member: I concur.
R. M. Craig, Member: I concur.

Rider by President:

I have ascertained that the present Registrar of Deeds at Pretoria has consistently refused to transfer immovable property on a judgment obtained in an Inferior Court and this must cause a certain amount of hardship where the value of the property does not warrant proceedings being instituted in a Superior Court. The Department of Native Affairs is aware of this and I understand steps are being taken to amend the Native Administration Act with a view to granting relief by empowering a Registrar of Deeds to act on a judgment from a Native Commissioner's Court.

For Appellants: Mr. Darby of Darby & Higgs of Durban.

For Respondents: Adv. Stalker (i.b. Parry and Foulis, Port Shepstone).

CASE No. 3 OF 1948.

MNENGWA MASONDO (Appellant) *v.* **MANGUBO NKOSI (Respondent).**

(N.A.C. Case No. 53/1/1948.)

PRETORIA: Monday, 14th June, 1948. Before Steenkamp, President, Liefeldt and King, Members of the Court (North-Eastern Division).

Practice and Procedure—Grounds insufficient for late noting of appeal.

Held:

(1) Lack of funds is not sufficient cause to condone the late noting of an appeal.

(2) Consent by respondent for condonation of late noting cannot be countenanced as such consent would circumvent the rules.

Appeal from the Court of the Native Commissioner, Piet Retief.

Steenkamp, President (delivering the judgment of the Court):—

Judgment was granted on 20th January, 1948, and the appeal, dated 21st January, 1948, was received by the Clerk of the Court on 28th February, 1948, but security was not lodged until 3rd March, 1948. The appeal was, therefore, noted 22 days late. Application is now made to condone the late noting. In the supporting affidavit applicant states as follows:—

(1) That I am the abovenamed plaintiff.
(2) That on the 20th January, 1948, judgment was given against me in the above case and I instructed my attorney to note an appeal.
(3) I am an uneducated native squatter residing on the farm Weltevrede, Transvaal, and I am liable to work for my master six months in each year and that I cannot go about without a pass from my master.
(4) That the farm Weltevrede and adjoining farms are under quarantine and subject to East Coast Fever regulations. The removal of cattle is restricted and cattle cannot be moved to the open market.
(5) As I am a Native, I cannot sell any cattle unless I have a certificate from two men of means certifying that I can sell the cattle as required under section 29 of Ordinance No. 6 of 1904.

The reason for the late noting can, therefore, be summarised to mean that appellant did not have sufficient money to proceed with the appeal.

In Joseph Mkizi *v.* Freddie Mkizi, 1942 N.A.C. (T. & N.) 7 [quoted with approval in Butelezi *v.* Butelezi 1947, N.A.C. (T. & N.) 38], the Court was not prepared to accept the excuse that appellant was unable to find the sum of £5 required to be deposited as security for costs.

Counsel for respondent has intimated that he does not object to the granting of the application but in the case of Matlala *v.* Sehope, 1938 N.A.C. (T. & N.) 1, it was held that a compact with the respondent's Counsel not to oppose the application for condonation, would not be countenanced as such compacts would circumvent rules framed for the requirements of the Court as well as for the parties. It, therefore, follows that the non-compliance with the rules of this Court cannot be condoned by the other side.

The appellant sued the respondent for £25 damages for seducing his daughter Jane and causing her pregnancy. The Native Commissioner has found that Jane was given in marriage to the respondent as a substitute for her sister who died shortly after lobolo had been paid. In view of this finding, which this Court *ex facie* the record is satisfied, is correct, no good purpose would be served in condoning the late noting of the appeal as appellant has no prospect of success.

The application is refused with costs.

For Appellant: Mr. M. Jackson of Pretoria.
For Respondent: Adv. Louw of Pretoria.

CASE No. 4 OF 1948.

NTEKANI DUBA (Appellant) *v.* **MAYELA NKOSI (Respondent).**

(N.A.C. Case No. 77/1/48.)

PRETORIA: Monday, 14th June, 1948. Before Steenkamp, President, Liefeldt and King, Members of the Court (North-Eastern Division).

Practice and Procedure—Appeals—Reasons for appeal if it is against Law, should state in what respect it is bad in law.

Plea—Recording of, in Native cases.

Evidence.—Native Commissioners are well advised to record name of tribes to which parties belong—Rule 3 *G.N.* 2253 *of* 1928 *requires that all oral evidence shall be given after the witness has been duly sworn or admonished to speak the truth.*

Native Law and Custom—Dissolution of customary union—claim for in Transvaal.

Held:

(1) Where in the notice of appeal it is alleged that a judgment is not in accordance with law and it is not stated specifically in which respect it is bad in law, then that ground of appeal will be disregarded.
(2) While Native litigants are not expected to file written pleas unless they are represented and the case is one of magnitude, yet the claim should be brought to the notice of the Defendant and his reply thereto should be properly recorded.
(3) Native Commissioners will be well advised to record the name of the tribe to which the respective parties belong as various tribes exist in the Transvaal and each tribe has its own laws and customs.
(4) A claim for dissolution of customary union has no place in Native Law and Custom actions in the Transvaal.
(5) The proper action is for a declaration that the husband has dissolved the marriage by driving his wife away.

Appeal from the Court of the Native Commissioner, Nelspruit.
Steenkamp, President (delivering the judgment of the Court):

The Plaintiff sued the Defendant for an order for the dissolution of the union between defendant and plaintiff's daughter Nani Duba and, secondly, payment of six head of cattle being balance of lobolo payable.

There is no direct evidence on record as to the name of the tribe to which the parties belong, but the Chief is mentioned as being Sebhulu and this Court accepts that the parties are Swazi, resident in Eastern Transvaal, for the reason that Sebhulu is a Swazi. Native Commissioners will be well advised to record the name of the tribe to which the respective parties belong. In fact, this is essential as various tribes exists in the Transvaal and each tribe has its own laws and customs.

The Native Commissioner gave judgment for Defendant with costs and against this judgment an appeal has been noted on the grounds that it is against the evidence and weight of evidence and bad in law. It is not stated in which respect it is bad in law.

In the case of Ndhlovu *v.* Elize 1947 N.A.C. (T. & N.) 90 quoting with approval Ponya *v.* Sitole 1944 N.A.C. (C.O.) 13, it was held that where it is alleged that a judgment is not in accordance with law, that fact should be stated as a specific ground of appeal and the law involved should be stated briefly. The ground that the judgment is bad in law is, therefore, disregarded.

Before dealing with the evidence this Court wishes to make it clear that according to the decision in the case of Manana *v.* Masuku 1947 N.A.C. (T. & N.) 116, a claim for the dissolution of a customary union has no place in Native law and custom actions in the Transvaal. The proper action would be for a declaration that the husband has in fact dissolved the union by driving his wife away and such a declaration on behalf of the woman can only be sought if the husband by conduct or directly maintains that the woman is still his wife.

The claim for dissolution of the union is badly brought before the Court and is without substance and, therefore, the claim should have been dismissed.

The remaining claim for delivery of six head of cattle being balance of lobolo payable is in order and this Court will deal with it. The Defendant's plea is a denial that he drove his wife away and states Plaintiff came and fetched her. He does not deny or admit that he still owes six head of cattle. There is on record the uncontradicted evidence of the Plaintiff that Defendant still owes six head of cattle and that plaintiff had demanded 12 head of cattle as lobolo and that 6 head had been paid. Defendant in cross-examining the plaintiff did not ask any questions as to the number of lobolo still payable. It must, therefore, be accepted that an agreement to pay 12 head of cattle actually existed between the parties.

It is observed that defendant did not give evidence on oath nor is there a note that he had been warned to speak the truth. Rule 3 of the Native Commissioner's Court Rules provides that all oral evidence shall be given after the witness has been duly sworn or admonished to speak the truth. In this case a note appears as follows: „Verweerder wil nie getuienis onder eed aflê nie sê ....."

Having accepted that there is no contradiction of plaintiff's evidence, this Court must hold that plaintiff has sufficiently proved that six head of cattle are still payable and he is entitled to judgment for this number. If Defendant feels that his wife has deserted him he is at liberty to sue his father-in-law for the return of his wife or failing which, the return of his lobolo.

The appeal is allowed in part with costs and the judgment of the Native Commissioner is altered to read:—

"For plaintiff for six head of cattle and costs. Claim for dissolution of customary union is dismissed."

Liefeldt (member):

The recording of the evidence in this case leaves much to be desired.

Likewise the lax manner in which the defendant's plea has been recorded calls for comment.

His reply to the claim is simply recorded as follows:—

> Verweerder se pleidooi: „Hy het nie vir Nani Duba weggeja, eiser het haar daar kom haal".

There is no reply to the claim for balance of dowry. While this is not essential, it should at least be stated that Defendant either denies or admits the claim.

Native Litigants are not expected to file written pleas unless they are represented and the case is one of magnitude. This Court has time upon time set out the procedure to be followed by the lower Courts in bringing the claim to the notice of the defendant and ascertaining and recording his reply thereto.

While a measure of latitude is desirable in dealing with Native cases, especially where litigants are not represented, laxity in procedure cannot be tolerated.

The manner in which the reasons for judgment have been drawn up is unsatisfactory.

The procedure to be followed by Presiding Officers in preparing their reasons for judgment has been clearly set out in the case of Ndoba Mcunu *v.* Mjanjelwa Gumede 1938 N.A.C. (T. & N.) 6.

The Native Commissioner has ignored these requirements and his reasons in their present form are of no assistance to this Court.

For Appellant: Adv. Jepson of Pretoria.
For Respondent: In person.

CASE No. 5 OF 1948.

MZIMANE MHLONGO (Appellant) *v.* **KLEINBOOI MTSHALI (Respondent).**

(N.A.C. Case No. 41/3/48.)

VRYHEID: Tuesday, 29th June, 1948. Before Steenkamp (President), Leibbrandt and Craig. Members of the Court (North-Eastern Division).

Practice and Procedure—Recalling of witnesses where party has not yet closed case. Amendment of record—Application for.

Appeal—On doubtful record if other more expeditious remedies exist.

Held:

(1) A trial Court should not lightly refuse an application to recall plaintiff to clear up certain circumstances especially as plaintiff had not yet closed his case.
(2) An application for amendment of a record should be supported by affidavits from the presiding officer and from the interpreter.
(3) Where an appellant has available other more expeditious remedies he should not appeal on a record the correctness of which is doubtful.

Appeal from the Court of the Native Commissioner, Vryheid.

Steenkamp, President (delivering the judgment of the Court):—

Appellant sued the respondent in the Court below for restoration of 5 head of cattle spoliated or wrongfully and unlawfully removed by or at the instance of the respondent from appellant's kraal and/or appellant's possession during or about the month of August, 1946.

It is clear from the evidence that appellant is not the owner of these cattle. On the contrary, they belong to a woman by the name of Nosombuluko but were kraaled at appellant's place of residence where this woman was also residing. This woman is not a relation of appellant's but there can be no doubt that she is an inmate of his kraal. The Native Commissioner granted an absolution judgment and against his judgment an appeal has been noted on the following grounds:—

(1) In the absence of withdrawal of the case, the Native Commissioner misdirected his mind in arriving at his ruling on the application for absolution.
(2) The plaintiff established a prima facie case for the defendant to meet, in that the evidence adduced proved that—
    (*a*) the cattle claimed were dipped and kraaled by plaintiff;
    (*b*) the cattle claimed were removed from plaintiff's kraal as claimed in the summons;
    (*c*) the widow and her minor son who owned the cattle were inmates of the plaintiff's kraal.
(3) The Court erred in granting absolution on the third claim.
(4) The Court erred in refusing a repeated application by plaintiff's attorney to recall the plaintiff, and such refusal prejudiced the plaintiff's case.
(5) The judgment is generally against the weight of the evidence and the law.

The hearing of the case was commenced by one judicial officer but before appellant had closed his case this judicial officer had been transferred and the case was resumed by the judicial officer who eventually gave judgment.

Counsel for both appellant and respondent had agreed that the evidence already recorded should be accepted as evidence as if recorded by the subsequent judicial officer. Before, however, further evidence was recorded Counsel for appellant applied to recall the appellant to explain conflicting evidence already given by him. The application was refused.

After appellant closed his case and after respondent had applied for absolution judgment Counsel for appellant again applied for leave to recall the appellant to clear up certain contradictory statements. The application was again refused and on respondent's application absolution judgment was entered with costs.

This Court holds the view that the Native Commissioner in exercising his discretion should have granted the application.

Apart from the conflicting evidence given by the appellant himeslf, there is, however, another aspect of the case which militates very strongly against the appellant and it is the fact that there is evidence on record on behalf of the appellant to the effect that it was not the respondent who removed the cattle but a woman by the name of Nozihlwati who actually was responsible for the removal of the cattle from the appellant's kraal.

The appellant in his evidence admits he is not the owner of the cattle and he was only claiming their restoration to his kraal where the real owner is residing. The absolution judgment does not prevent the real owner from instituting action against the person who is in possession of cattle she alleges belong to her.

Appellant was ill-advised to have proceeded with the appeal as there were available other more expeditious remedies.

The other grounds of appeal fall away and it is not necessary to comment on them.

There is the application for amendment of the record but the application is not supported by affidavit from the judicial officer who recorded the evidence in the first part of the hearing nor is there an affidavit from the interpreter. All we have on record are statements to the effect that neither the interpreter nor the judicial officer can remember what evidence the plaintiff gave. In the absence of affidavits it will not be possible for this Court to order an amendment of the record and as there is still a way open for this case to be brought to a definite conclusion this Court considers it is not in the interests of justice to prolong proceedings by calling this very doubtful additional evidence.

If a final judgment had been given then this Court would have been inclined to order the setting aside of all the proceedings and the institution *de novo* of the action, but as such a course is open to the parties or to any other interested party it does not become necessary for this Court to consider an order for such setting aside.

The appeal is dismissed with costs.

For Appellant: Mr. J. F. du Toit of Vryheid.
For Respondent: Mr. W. E. White of Vryheid.

CASE No. 6 OF 1948.

MABHENGWANE KHANYI (Appellant) *v.* **SAMUEL NKOSI AND MGANGANE MKONZA (Respondents).**

(N.A.C. No. 26/1/48.)

VRYHEID: Tuesday, 29th June, 1948. Before Steenkamp, President, and Leibbrandt and Craig, Members of the Court (North-Eastern Division).

Practice and Procedure—Damages—Dependants of deceased—Reduction of—In unlawful killing.

Held: A claim for damages is automatically reduced if found that the number of dependants is less than the number alleged in summons.

Appeal from the Court of the Native Commissioner, Ngotshe.

Steenkamp, President (delivering the judgment of the Court):—

In his summons in the Native Commissioner's Court, plaintiff, in his capacity as guardian over the widow and minor children of the late Ambrose Khanyi, claims £100 damages suffered as a result of the wrongful and unlawful killing of the deceased by defendant No. 1.

At the conclusion of the evidence of the first witness the attorney for the plaintiff applied to have the summons amended to read " widows " and not " widow " as the evidence had disclosed that the plaintiff had two wives and not one. This application was granted and the claim, therefore, became one for £100 damages sustained by the plaintiff in his capacity as guardian over the two widows and 4 minor children.

The facts of the case are not in dispute and sufficient evidence was produced to convince the Court that the defendant No. 1 had in fact actually killed Ambrose Khanyi and was responsible in law for damages sustained by the widow or widows and their children.

Mabhengwane Khanyi, father of the deceased, admits that although his son had two wives he had only married one of them. He had never celebrated the second marriage and a customary union between these parties did not exist. As the deceased, under Native Law and custom, was not legally responsible for the support of this other woman and her 2 children no damages are payable on their behalf.

It has been shown in evidence that the deceased earned approximately £150 while working in Durban and Johannesburg over a number of years and that he remitted a large portion of this money to the kraalhead for the maintenance of his family. He was a man of about 40 years of age and would under normal circumstances have been able to support his dependants for some considerable time. The position at the time of his death was that he could, and did, remit an adequate amount for their support, and without going into details the amount of £100 would not appear to be inadequate for the maintenance of 2 wives and 4 minor children, two of whom were still very young.

Despite the fact that although damages have been claimed for 2 wives and 4 children it has been clearly shown that damages in respect of only one wife and two children are claimable. Therefore the claim is automatically halved and the Court cannot give damages higher than the amount claimed.

It is accordingly ordered that the appeal be allowed with costs in so far as the quantam of damages is concerned and the Native Commissioner's judgment is altered to read " for the plaintiff for £50 and costs."

For Appellant: Mr. H. L. Myburgh of Vryheid.
For Respondents: Mr. W. E. White of Vryheid.

CASE No. 7 OF 1948.

JOSEPH MADUMA (Appellant) *v.* **ANANIA MNCUBE (Respondent).**

(N.A.C. Case No. 28/4/48.)

VRYHEID: Wednesday, 30th June, 1948. Before Steenkamp, President, Leibbrandt and Craig, Members of the Court (North-Eastern Division).

Practice and Procedure—Chief's Court, Application condonation late appeal—Assistance by Clerk of the Court.

Held: Where an appellant from a Chief's Court has not formally noted the appeal in time but there is evidence that the Clerk of Court had refused to assist the appellant because the judgment had not yet been registered, the application for condonation should be considered favourable to the appellant.

Appeal from the Court of the Native Commissioner, Nongoma.

Steenkamp, President (delivering the judgment of the Court):—

Applicant was sued by the respondent in a Chief's Court and judgment was granted against him. No written notice of appeal was lodged within the prescribed period of 30 days but applicant then applied to the Native Commissioner for condonation of the late noting of an appeal. This was refused by the Native Commissioner and an appeal has now been lodged to this Court. In the supporting affidavit applicant states that he notified the Chief's induna of his intention to appeal. He also states that a Messenger fixed a date for registration of the case at the Native Commissioner's Court but that he failed to appear on the appointed date. On the day the application was set down for hearing the applicant amplified his affidavit and states that as soon as judgment was given he went to the Native Commissioner's office to lodge an appeal but he was informed that he must return when the judgment was registered by the tribal constable. Apparently judgment had not yet been registered. The applicant being under the impression that he had lodged an appeal did nothing further until an attachment was made by the Chief's messenger. He then formally lodged an appeal against the Chief's judgment and applied for the condonation of the late noting. In the opinion of this Court the applicant complied with the provisions of Rule 5 of the Chief's Courts Rules when he appeared at a Native Commissioner's office to lodge the appeal. There is no provision in Rule 5 that an appeal may only be lodged after the judgment had been registered.

The Native Commissioner in his reasons for judgment states " it is true that applicant may have been told that nothing could be done before the Chief's judgment had been reported." There must have been a doubt in the mind of the Native Commissioner as to whether or not the applicant had appeared before the Clerk of the Court to note an appeal. There being this doubt, the applicant is entitled to receive the benefit thereof and the Native Commissioner should have granted the application.

This Court wishes to lay it down in no uncertain way that Clerks of the Courts have no right to refuse assistance to a litigant who wishes to appeal against the Chief's judgment. It is immaterial whether the judgment had or had not been registered by the Chief, we are dealing with ignorant Natives, and once a Native has been to the Clerk of the Court to lodge an appeal he is entitled to assume that he has complied with the requirements of the law.

The appeal is accordingly allowed with costs and the Native Commissioner's judgment is altered to read: "Application for condonation of late noting of appeal from Chief's Court is granted. Applicant has sought the indulgence of the Native Commissioner's Court and therefore he must pay costs of application."

For Appellant: Mr. H. L. Myburgh of Vryheid.
Respondent in default.

CASE No. 8 OF 1948.

MAKAKENI MAZIBUKO (Appellant) *v.* **MSUPE KUBHEKA (Respondent).**

(N.A.C. Case No. 32/11/48.

PIETERMARITZBURG: Monday, 12th July, 1948: Before Steenkamp (President), Cowan and Oftebro, Members of the Court (North-Eastern Division).

Law of Delicts—Assault—excessive force—damages. Provocation mitigates damages.

Held:

(1) If defendant uses force in excess of what could be termed reasonable he is liable in damages.
(2) Provocation mitigates damages notwithstanding that plaintiff might have been annoyed because defendant's goats had trespassed in his land.
(3) That an award of £15 damages is excessive and this Court is consequently justified in reducing the amount to £4.

Appeal from the Court of the Native Commissioner, Estcourt.

Steenkamp, President (delivering the judgment of the Court):

The plaintiff claimed from defendant £50 being damages for assault. The Native Commissioner gave judgment in favour of plaintiff for £15 and costs and against this judgment an appeal has been noted on the following grounds:—

1. That the finding and decision is against the weight of evidence.
2. That plaintiff failed to establish any damages and certainly no loss in the sum of £15.
3. That plaintiff was the cause of and provoked the quarrel and himself assaulted the defendant.

In a written plea filed, defendant admits he assaulted the plaintiff in retaliation to plaintiff's attack and that he used plaintiff's own sticks.

There can be no doubt that defendant in assaulting the plaintiff did not do so to repel the attack but as an act of retaliation against the plaintiff. At that time plaintiff must have been disarmed notwithstanding that his intention was to assault the defendant or had already done so without any serious consequences.

It would appear that plaintiff and defendant quarrelled over the trespass of goats. According to plaintiff's evidence he received two injuries to the head and on his third finger which, according to the Native Commissioner, appears stiff, but there is no medical evidence in support of this.

While conceding that plaintiff might have made an attempt to assault the defendant and actually threw a stone at him which the defendant dodged, the defendant when plaintiff became disarmed had no right to belabour him with blows and using plaintiff's own sticks. In other words, the defendant used force in excess of what could be termed reasonable in the circumstances.

The amount of damages awarded would appear excessive. Every deliberate assault nearly always involves *contumelia*. This was not a deliberate assault but can be classed as one exceeding reasonableness. In the case of Machake *v.* Nkune 1946, N.A.C, (T. & N.) 95, it was held that provocation mitigates damages. There can be no doubt when plaintiff went to defendant's kraal he was annoyed and the fact that he threw a stone at defendant indicates that he originated the trouble.

The Appeal Court will not lightly interfere with a trial court's discretion on the quantum of damages awarded but in the present case the Native Commissioner has overlooked the fact that Plaintiff was not altogether blameless and from his reasons it is clear that he has not taken this sufficiently into consideration in assessing the damages, which we consider are excessive.

The appeal is allowed in part, with costs and the Native Commissioner's judgment is altered to read:—

"For plaintiff for £4 with costs."

For Appellant: Adv. A. A. Kennedy (i.b. Hellet & de Waal, Escourt).
For Respondent: Adv. G. Caminsky (i.b. J. M. K. Chadwick, Estcourt).

CASE No. 9 OF 1948.

QONDA MCWABE (Appellant) *v.* **GEORGE MBUYISWA (Respondent).**

(N.A.C. Case No. 15/1/48.)

PIETERMARITZBURG: Monday, 12th July, 1948. Before Steenkamp, President, Cowan and Ofetbro, Members of the Court (North-Eastern Division).

Practice and Procedure—Writ of execution—Issued on wrong form—Judgment for specific cattle.

Held:

(1) Where judgment was given for specific cattle the judgment creditor is entitled to those cattle notwithstanding that in the writ of execution an alternative value was placed on the cattle.

(2) The issue of a writ of execution on the wrong form does not prejudice the judgment creditor.

Appeal from the Court of the Native Commissioner, Ixopo.

Steenkamp, President (delivering the judgment of the Court):—

The judgment creditor (appellant) sued the judgment debtor Minimbele in the Chief's Court for delivery of four head of cattle—an original Inco cow placed by judgment creditor with the judgment debtor together with its three increase.

The Chief gave judgment for plaintiff (judgment creditor) for four head of cattle and costs. Defendant (judgment debtor) appealed to the Native Commissioner who dismissed the appeal with costs.

Thereafter a writ was issued out of the Native Commissioner's Court on form U.D.J. 157 which is Form 36 prescribed in the First Annexure of the Magistrate's Court Act No. 32 of 1944, and which is applicable to a Native Commissioner's Court by virtue of Rule 35 of the Native Commissioner's Court rules. On the warrant of execution the execution creditor is claiming 4 head of cattle £20 plus £4. 18s. 9d. costs. Counsel for respondent has advanced the view that from the pleadings and judgment in the previous case it is not clear whether the Chief gave judgment for the four specific head of cattle claimed or only for four head of cattle. The record of the previous case was handed in by consent and although the evidence given in that case cannot be used as evidence in the present case, this Court knows of no inhibition why the Chief's reasons for judgment as recorded in the notice of appeal from the Chief's Court and which is the basis on which the appeal was heard by the Native Commissioner, should not be referred to to enable this Court to decide what the judgment was. The Chief in his reasons states that all plaintiff's witnesses say that the original Inco cow was bought by plaintiff from defendant as a heifer for £5 and left at defendant's kraal, in their presence. It is therefore abundantly clear that a judgment was given by the Chief for four specific head of cattle.

A warrant on Form 35 as prescribed in the First Annexure of the Magistrate's Court Act should have been issued. The attorney for the judgment creditor made an error in issuing a writ on the wrong form but must the Court hold that because a mistake is made, the judgment creditor must now suffer perhaps irreparable loss and be deprived of a right *in rem* which he has in the cattle?

The judgment creditor obtained a judgment in his favour for the specific cattle he had sued for, having been able to prove that he had a right *in rem* in these cattle.

The judgment debtor who previously had possession of the cattle paid them out as lobolo to the claimant. He could not give the claimant any better title than what he had and therefore the judgment creditor retained his absolute right in the stock and may vindicate his right of ownership. The cattle were attached by the Messenger of the Court. These are the identical cattle claimed by the judgment creditor and therefore notwithstanding a technical error made by the attorney for the judgment creditor in using the wrong form, the cattle are executable.

The appeal is allowed with costs and the Native Commissioner's judgment is altered to read: "Cattle declared executable with costs."

For Appellant: Adv. J. R. N. Swain (i.b. McGillewie & Co., Pietermaritzburg)
For Respondent: Gordon Clulow, Ixopo.

CASE No. 10 OF 1948.

MDHLENI DHLAMINI AND OTHERS (Appellants) *v.* SOKWETSHATA NGUBANE (Respondent).

(N.A.C. Case No. 22/2/48.)

PIETERMARITZBURG: Tuesday, 13th July, 1948. Before Steenkamp (President), Cowan and Oftebro, Members of the Court (North-Eastern Division).

Law of Delicts.—Unlawful killing of widow's son—damages must be proved—damages under Native law discussed.

Held: That the unlawful killing of a widow's second son does not necessarily mean that she suffered damages and calculable pecuniary loss must be proved beyond any doubt.

The question whether damages for unlawful killing can be claimed under Native law and custom discussed but not decided.

Appeal from the Court of the Native Commissioner, Msinga.

Steenkamp (President), delivering judgment of the Court:—

In this case the plaintiff, in his capacity as kraal head and guardian of his widowed mother, Manomdhloyi, claims from the six defendants, jointly and severally, the sum of £100 as damages sustained by her for killing her younger son, Mkosini, in January, 1941, who, it is alleged, was her sole support.

In order to succeed, it was necessary for the plaintiff to prove (*a*) calculable pecuniary loss on the part of Manomdhlovi and (*b*) that the killing of Mkosini was caused by the unlawful acts of the defendants. The Native Commissioner found that both these requirements had been proved by the plaintiff and gave judgment in his favour in the sum £100.

Against this judgment an appeal was noted, the main grounds of which were that the Native Commissioner erred in finding loss on the part of the plaintiff when he (plaintiff) led no evidence in proof of damage suffered and that the Native Commissioner erred in finding that the appellants were the cause of the death of the deceased.

The only evidence regarding the pecuniary loss alleged to have been suffered by Manomdhloyi was that given by the plaintiff himself. He states that Mkosini was a single man who lived at his kraal and was the sole support of their mother during his lifetime. He goes on to say that deceased earned £4 a month from a Mr. Art Nel as boss boy of the milking shed, that he would work for periods of eight or sixteen months with intervals of three months for rest. He alleges that Mkosini supported his mother, with all his earnings, that he gave her "£3 or £2 per month . . . . never less than £2. There were occasions when he did not send money but he would then send £4 at a time." He states that he had made the arrangement with his brother to support his mother.

On this evidence the Native Commissioner found that Manomdhloyi had suffered damages in the amount of £2 a month.

In the opinion of this Court the plaintiff has failed to prove that Manomdhloyi has suffered damages in any amount at all. He, as the kraal head, was entitled to the earnings of his younger brother and his story that an arrangement had been arrived at that these earnings amounting, on his own statement, to at least £2 a month should be remitted to their mother is an improbable one. She is an old woman of approximately 79 years of age whose needs must have been few and it is unlikely that she would be allowed such a comparatively large amount for her own use. In the absence of any corroborative evidence whatever, this Court is not prepared to accept the plaintiff's bare statement that the alleged payments of £2 a month were ever made by Mkosini to his mother. Plaintiff admits that he himself has supported his mother since Mkosini's death and no actual loss by her has therefore been established. It would appear that the plaintiff's real object in bringing this action was to recoup himself for the expense he has been put to in maintaining his mother which he was legally liable to do.

On this ground alone the appeal must succeed and it is unnecessary to decide whether or not the appellants were in fact the cause of the death of the deceased.

The appeal is allowed with costs and the Native Commissioner's judgment is altered to one of "Absolution from the instance with costs."

Addendum by Steenkamp (President):—

There is no note on the record whether the Native Commissioner decided the case according to Native law and custom or whether he applied common law. First of all there is the question of capacity. Section 11 (3) of the Native Administration Act 38 of 1927, as amended, reads as follows:—

> The capacity of a Native to enter into any transaction or to enforce or defend his rights in any court of law shall, subject to any statutory provision affecting any such capacity of a Native, be determined as if he were a European: Provided that—
>
> (*a*) if the existence or extent of any right held or alleged to be held by a Native or of any obligation resting or alleged to be resting upon a Native depends upon or is governed by any native law (whether codified or uncodified) the capacity of the Native concerned in relation to any matter affecting that right or obligation shall be determined according to the said native law;
>
> (*b*) a native woman who is a partner in a customary union and who is living with her husband, shall be deemed to be a minor and her husband shall be deemed to be her guardian.

Now in Natal there exists a statutory provision affecting the capacity of a Native, *vide* section 27 of the Code which reads to the effect that a native female is deemed a perpetual minor in law and has no independent powers. . . .

It therefore follows that concerning the capacity of a Native female the Code must be applied but as capacity is divisable from the actual cause of action, in a case of damages it seems quite possible and permissible to decide the capacity according to one system of law and the cause of action under another system.

In the case of ex parte Minister of Native Affairs in re Yago *v.* Beyi, 1948 SALR.388 on page 397, Schreiner J. A. remarked "I think that he (Native Commissioner) should only finally decide which system of law he is going to apply after considering all the evidence and argument as part of his eventual decision on the case; but it would probably be convenient in many cases for him to indicate at an earlier stage, and possibly even at the commencement of the trial, what law he would provisionally regard as applicable."

From this it is apparent that a Native Commissioner must make a decision at some stage of the proceedings and his decision should be recorded. If an appeal is lodged then this Court would be in a position to see what system was applied. It is not the function of this Court to make a decision and it can only on appeal decide whether or not the Native Commissioner has made a correct decision [see Qaba v. Ndudula, 1947 N.A.C. (C.O.) 79].

In the present case this Court is somewhat left in doubt as to whether the Native Commissioner intended to apply Native Law and Custom. Outside Natal no action for damages for assault or unlawful killing can be brought under Native Law and Custom but in the case of Sipsongomana *v.* Nkuku and others, 1901 NHC.26 it was held by a majority of the judges that the killing of a person gave rise to an action on the part of the relatives, such action being based on Native Law. In that case the Native High Court awarded £50 damages plus £9. 16s. 0d. funeral expenses. The damages were based on loss of future support. There is, however, another aspect which I sonsider important and that is that if action is brought under common law a plea of prescription may be raised, whereas, if brought under Native Law and Custom no such defence may be taken. This is certainly an anomaly difficult to overcome if the decision in Sopongomana case is correct, especially as damages were assessed under Common Law principles.

In ex parte Minister of Native Affairs quoted above the learned judge remarked as follows:—

> "I can find no support in the language of Act 38 of 1927 for the president's view that native law should be treated as *prima facie* applicable in cases between natives. On the contrary, the indications are rather that common law was intended to be applied unless the native commsisioner in his discretion saw fit in a proper case to apply native law. That view is supported by the general shape of the sub-section, which does not provide that the Native Commissioner shall have a discretion to apply Common Law or even that he shall have a discretion to apply Common Law or Native Law. Framed as it is, it appears to me that the sub-section assumes that the Native Commissioner should in general apply Common Law and on that assumption empowers him in a proper case to apply Native Law."

In applying his discretion a Native Commissioner must bear in mind certain defences open to the defendant if the case is brought under Common Law and which cannot be raised in a case in which Native Law is applicable.

I have in mind (although there might be others) Prescription already mentioned and kraal head responsibility.

For Appellant: Adv. J. R. N. Swain (i.b. McGibbon & Brokensha, Pietermaritzburg).

For Respondent: Adv. J. Stalker (i.b. A. G. Bestall, Kranskop).

CASE No. 11 OF 1948.

SIZE NXUMALO (Appellant) *v.* BANGUBUKOSI NGOBESE (Respondent).

(N.A.C. Case No. 27/2/48.)

ESHOWE: Wednesday, 21st July, 1948. Before Steenkamp, President, Cohen and Thompson, Members of the Court (North-Eastern Division).

Practice and Procedure—Appeals—Notices of set down to be served on parties—Court appoints Counsel for respondent where he could not be found.

Mercantile Law—Contract of Sale—Subject matter should be ascertained with certainty.

The Court is not satisfied that notice of hearing had been brought to the notice of the respondent who could not be found and as appellant is entitled to prosecute his appeal and this should not be delayed indefinitely, Counsel is appointed for respondent to argue in favour of the Native Commissioner's judgment.

Held:

(1) That the subject matter of a sale should be ascertained with certainty;
(2) that where there is a dispute as to which animal was sold by description, it cannot be said that the purchaser and seller were *ad idem*.

Appeal from the Court of the Native Commissioner, Nkandhla.

Steenkamp (President) (delivering the judgment of the Court):—

The notice of the hearing of the appeal has not been served on the respondent personally and the Registrar has received a letter from the Clerk of the Court to the effect that respondent has left the district and is somewhere at Durban or Pietermaritzburg. His relatives do not know his address but the Clerk of the Court, from information received by them, is satisfied that respondent is aware of the fact that the appeal will be heard during this session of the Court. This, however, is not sufficient for this Court to hold that respondent has received proper notice.

The notice of appeal is addressed to the respondent but it is not certain whether or not he ever received it.

The appellant is entitled to prosecute his appeal and this Court holds the view that in such circumstances the hearing of the appeal should not be delayed indefinitely and has therefore requested Mr. Attorney Brien to argue on behalf of respondent in favour of the Native Commissioner's judgment. Mr. Brien has kindly consented to do so and this Court is indebted to him for the argument advanced on behalf of respondent who was not represented in the Court below.

The appellant claimed in the Chief's Court one beast and its two increase, which beast he bought from respondent for £7.

The respondent in his reply in the Chief's Court admits the transaction but states that appellant never saw the beast nor has he taken delivery when pointed out and refused to accept it.

The significance of this reply can be gathered from the evidence which is to the effect that while appellant and respondent worked together at Durban, respondent received £7 from the appellant for a certain beast but no particular beast was pointed out. Appellant did not know respondent's cattle and all he can tell the Court is that a wasakazi cow was described and that this cow was at the kraal of one Gabela.

The Chief gave judgment for the appellant as prayed with costs but on appeal to the Native Commissioner the judgment was altered to one for "Plaintiff (appellant) for the sum of £7".

An appeal has now been noted to this Court. The appellant was not satisfied with a judgment of £7 in his favour and he requires to be delivered to him the wasakazi cow and its progeny born after the transaction was concluded.

The Native Commissioner in his reasons states that no contract of purchase and sale was concluded in that the beast was not pointed out by the respondent to the appellant. One of the essentials in a contract of purchase and sale is consent (*consensns ad idem*), that is, it must exist with certainty as to the subject matter of the sale and its essential characteristics (MacKeurton p. 4).

The subject matter in this case is a cow but can it be said that the parties were *ad idem* as to which cow was intended? The respondent might have had in mind a different beast to the one eventually seen and selected by the appellant. In fact, the respondent in his evidence states that at the time he received the £7 he informed appellant that when he (respondent) got home he would point out the beast and actually sent for appellant to come and see the beast but he refused to come. It is clear from appellant's evidence that after his return from Durban he saw a wasakazi cow at Gabele's kraal and that is the cow he had bought. From this can be gathered the appellant genuinely believed that he had bought the cow he subsequently saw and that respondent had intended to sell that particular cow.

It must be expected that when a sale takes place in such circumstances a misunderstanding can easily arise and to describe with exact precision the subject matter is expecting something far in excess of what is normal in the human mind.

Arguments were mostly aimed at the fact that no legal delivery took place. A contract of purchase and sale can still be such notwithstanding that delivery had not taken place but the subject matter must be described with precision and once the Court finds that the parties were not *ad idem* as to the subject matter or, as in this case, the specific cow, the buyer has no other remedy apart from the refund of his money. In other words, he cannot compel the seller to deliver an article which the latter had not intended to dispose of.

The appeal is dismissed with costs.

For Appellant: Mr. H. H. Kent of Eshowe.

For Respondent: Mr. S. Brien of Eshowe (at request of Court).

CASE No. 12 OF 1948.

TENGUMUTI JELE (Appellant) *v.* **BACITILE MANQELE duly assisted by NSUNGULO MANQELE (Respondent).**

(N.A.C. Case No. 10/1/48.)

ESHOWE: Wednesday, 21st July, 1948. Before Steenkamp, President, Cohen and Thompson, Members of the Court (North-Eastern Division).

Practice and Procedure—Chiefs' Courts—Appeal from—actions for defamation—in notice of appeal it is not necessary to set out actual defamatory words used.

Held: That on an appeal from the Chief's Court to the Native Commissioner's Court, it is not necessary to set out in the Notice of Appeal the original words in the language used nor is it necessary to set out that the words had been published.

Appeal from the Court of the Native Commissioner, Hlabisa.

Steenkamp, President (delivering the judgment of the Court):—

Plaintiff sued defendant in a Chief's Court for £5 damages suffered by reason of defendant having accused her of bewitching his wife. The Chief awarded plaintiff £5 damages. The appeal to the Native Commissioner was dismissed with costs. An appeal is now brought in this Court against the whole of the judgment.

Counsel for the appellant advanced the following arguments:—

(1) The summons did not allege publication.

(2) The original words in the language used were not set out.

While these contentions might have had substance if it had been a case of the first instance in the Native Commissioner's Court, the statement of the cause of action before the Chief was drawn up in accordance with the procedure laid down by this Court in Cleopas Zwane *v.* James Sitoli, 1947 N.A.C. (T. & N.) 30, and Counsel's arguments accordingly fall away.

On the merits several witnesses deposed to defendant having uttered the words complained of. These words are *per se* actionable. The Native Commissioner accepted the evidence of the plaintiff and her witnesses and this Court can find no fault with this. The defence is a bare denial by defendant that he uttered the words in question.

The damages awarded in the Court below do not appear excessive and the appeal is dismissed with costs.

For Appellant: Mr. J. Gerson of Empangeni.
Respondents: In person.

CASE No. 13 OF 1948.

MFISWA MKWANAZI (Appellant) *v.* **ZITUME ZULU (Respondent).**

(N.A.C. Case No. 23/1/48.)

ESHOWE: Wednesday, 21st July, 1948. Before Steenkamp (President), Cohen and Thompson, Members of the Court (North-Eastern Division).

Practice and Procedure.—Review of Proceedings—prejudice—absence of important witness on military service—delay to apply for review.

Held:

(1) that in an application for review three years after judgment, the Court must take into consideration whether or not the respondent has suffered *prejudice.*

(2) That the absence of an important witness on military service might be sufficient ground for review but application therefor should not be delayed until the witness returns.

(3) That a delay of 2½ years after the witness returned militates against the granting of the application.

Appeal from the Court of the Native Commissioner, Mtunzini.

Steenkamp, President (delivering the judgment of the Court):—

This is an application for the review of a judgment granted by the Native Commissioner, Mtunzini, on 6th June, 1945.

The grounds of review can be briefly summarised to the effect that one of applicant's (defendant at the trial) witnesses was on military service at the date of trial and that the Native Commissioner refused application for the adjournment of the case.

According to the affidavit filed by the applicant, his attorney, the late Mr. W. C. L. Hedding, had made a request for the case to be adjourned until Mr. K. H. Ferguson, Clerk of the Court, Mtunzini, and who is a witness returns form military service, but the Native Commissioner refused such application and gave judgment without the evidence of Mr. Ferguson. On reference to Mr. Ferguson's affidavit it is found that after his return from military service he mentioned to Mr. Hedding the information he had received from the late father of the plaintiff. Mr. Hedding thereupon advised Mr. Ferguson that applicant had instructed him to apply to this Court for the case to be reviewed as he (Mr. Ferguson) had returned to Mtunzini.

It is difficult to understand the reason Mr. Hedding did not take immediate steps after judgment or at the time his application for adjournment had been refused, for the case to be reviewed if it is true that an application for postponement had been made. It is observed that the Native Commissioner states in an affidavit that he has no recollection that any suggestion or request was made to him for the case to be adjourned to enable applicant to call Mr. Ferguson as a witness. He goes on and states that he feels sure if such a request had been made and been refused he would have made a note in the record.

Mr. Ferguson returned to Mtunzini on 23rd October, 1945, i.e. just over four months after judgment had been given, but application for review was only made 2½ years later. It is true Mr. Hedding had died during May 1947 but it is difficult for this Court to follow that any attorney if instructed properly would have delayed in taking steps for review for a period of 18 months if there were any substance in applicant's allegations.

This strongly militates against the granting of the application but there is also the very important aspect of prejudice to respondent to be considered. He has had a judgment in his favour over 2½ years before steps for review are taken. Such steps could have been taken within 6 months from the date of judgment.

The case of Jele *v.* Shangese, 1945 T. & N. 6, was one in which the Native Commissioner had condoned the late noting of an appeal from the Chief's Court. An appeal was noted to this Court against the granting of the condonation and in that case this Court, in quoting the remarks of Solomon J. in Cairns Executors *v.* Gaarn, 1912 A.D. 181, stated that when a party has obtained a judgment in his favour and the time allowed for appealing has lapsed, he is in a very strong position and he should not be disturbed except in very exceptional circumstances.

No period is limited within which proceedings for review must be taken (Ghislin *v.* Syster, 1874 Buch, 57, Immelman *v.* Keller & R. M. Fraserburg, 20 S.C. 63), but there must be some limit to the time in which judgments can be brought in review (per Searle J. in Scholtz *v.* Niehaus, 1915 C.P.D. at p. 291) and, if a party stands by and allows the proceedings to continue for a considerable time, the Court will not assist him by way of review.

Review has been allowed after three months, where the delay was reasonably explained (Crawford *v.* Wagner's Garage, 12 P.H. F 71).

In view of the principles laid down in these cases this Court holds that respondent will suffer substantial prejudice if the proceedings are set aside after such a long period and the application is accordingly refused with costs.

For Appellant: Mr. Brien of Wynne and Wynne, Eshowe.

Respondent in default.

CASE No. 14 OF 1948.

NKOHLO NTULI (Appellant) *v.* **VELAMVA MZIMELA (Respondent).**

(N.A.C. Case No. 10/2/48.)

ESHOWE: Wednesday, 21st July, 1948. Before Steenkamp, President, Cohen and Thompson, Members of the Court (North-Eastern Division).

Practice and Procedure—Summons—The drawing up of—Process in aid cannot be converted into Interpleader or other action for release of stock.

Held:

(1) That when a summons is drawn up by the Clerk of the Court, the Native Commissioner or some other senior official should scrutinise it before issue.

(2) that an application for process in aid cannot be converted into the trial of an Interpleader or other action for release of attached stock.

Appeal from the Court of the Native Commissioner, Hlabisa.

Steenkamp, President (delivering the judgment of the Court):—

Judgment was delivered on 29th January, 1948, and appeal noted on 17th May, 1948. Application is made for the condonation of the late noting. In view of the apparent irregularities as pointed out hereunder, it is in the interest of justice to grant condonation.

The relevant portions of the affidavit filed in support of the application for condonation read as follows:—

> " I have good grounds of appeal, namely, that the application couched as it was in terms of section 2 of Government Notice No. 2255 of 1928 (Native Chiefs' Court rules) for process in aid and the Native Commissioner could not try these proceedings by way of application and claim should have been in the form of a summons claiming ownership in the said cattle and demanding their return from the respondent. Proceedings under the said Government Notice can only be taken for the attachment of cattle and not for their release."

A civil Case No. 139/44 was tried by the Chief in which Velamva was the plaintiff and Ntangwene the defendant. Judgment was given in favour of the plaintiff for two head of cattle and costs. The Chief's messenger attached three head of cattle at the cattle dipping tank and handed them over to the judgment creditor Velamva.

The applicant Nkohlo Ntuli thereafter cited the judgment creditor in an application for Process in Aid in terms of the proviso to section 2 of the Native Chiefs' Court rules.

To commence with, section 2 contains no proviso, and where the applicant or the official who drew up the application obtained this from is beyond comprehension. An affidavit is attached to the application and from this affidavit it would appear that what the applicant really claim is the release of the cattle attached on the grounds that they belong to him and are not the property of the judgment debtor. The affidavit was made before the Clerk of the Court and the application was signed by the same official. It will be difficult, if not impossible, to find other cases showing such a gross disregard or ignorance of procedure and this Court is at a loss to understand why the Native Commissioner or some other senior official on his staff was not consulted before such important documents as Court proceedings were issued. The time has arrived for this Court to express in no uncertain manner its displeasure at the way in which civil proceedings are attended to and Native Commissioners would be well advised to issue instructions to Clerks of Courts to place before him or some other responsible official for the purpose of scrutiny all process before issue.

The manner in which these documents are drawn up shows that the Clerk of the Court did not apply his mind to the duty assigned to him.

The Native Commissioner in his reasons for judgment admits that the presentation of the case as regards the sequence of events might not be all that is desired. He, however, states that he was able to obtain the facts with not much difficulty.

This Court has always permitted a certain amount of latitude in Native cases, but where an application is made instead of an action being brought, this Court must lay it down that such a procedure is irregular. No application can be converted into an action, as a judgment or finding on an application is in no way a final judgment on the merits of the case.

In the case of Majozi *v.* Shezi, 1937 N.A.C. (T. & N.) 140, it was laid down that in case of wrongful attachment of stock, a claim could be brought by way of action in a Native Commissioner's Court. The word " action " denotes what it means and does not mean " application ".

In view of this irregularity it is ordered that the proceedings be set aside.

There can be no doubt that the appellant as between the parties is as much to blame for the state of affairs as the respondent is. He should never have proceeded in the form he did and the respondent should have objected. Appellant has lodged an appeal against his own act and therefore he is not entitled to costs nor is the respondent so entitled to costs.

In these circumstances justice will be met if no order is made as to costs of appeal and costs in the Court below.

For Appellant: Mr. H. H. Kent of Eshowe.
For Respondent: Mr. Brien, of Wynne and Wynne. Eshowe.

CASE No. 15 OF 1948.

MHLUNGU SIKOSANA (Appellant) *v.* **MDALAMBANA MHLONGO (Respondent).**

(N.A.C. Case No. 1/1/48.)

DURBAN: Monday, 26th July, 1948. Before Steenkamp (President), Tweedie and Bridle, Members of the Court (North-Eastern Division).

Law of Evidence.—Presumption—Legal customary Union.

Practice and Procedure.—Definite judgments must be given—Natal Code of Native Law—consent in customary Unions—section 59 (1) (a). *Declaration in terms of section* 59 (1) (c) *of the Code—evidence of husband must be accepted if woman and official witness are dead.*

Held:

(1) Where a man and woman lived together for many years and had 8 children together, the presumption is that a legal customary union had been entered into.
(2) A definite judgment in terms of Rule 28 of the Native Commissioner's rules must be given.
(3) Where the guardian of the woman allowed her to live with a man for many years this is sufficient consent in terms of section 59 (1) (*a*) of the Code.
(4) Where the official witness and the woman are dead the evidence of the husband must as a rule be accepted that the declaration in terms of section 59 (1) (*c*) of the Code had been made.

Appeal from the Court of the Native Commissioner, Harding.

Steenkamp, President (delivering the judgment of the Court):—

The plaintiff sued the defendant before the Chief for the return of four children and 8 head of cattle being "mvimba" fees payable. He alleges that defendant and his sister Jemima lived together as man and wife, without a customary union having been entered into, for many years and she bore 8 children by defendant—four of which are still alive.

The Chief gave judgment in favour of the plaintiff and defendant appealed to the Native Commissioner who dismissed the appeal with costs.

An appeal has now been lodged to this Court on the following grounds:—

1. That the judgment was against the weight of evidence.
2. That the evidence clearly established that the essentials of the marriage between the appellant and the respondent's sister, Jemina, has been complied with, and although the marriage was never actually registered, the Native Commissioner was wrong in holding that the union between the above could not be regarded as a marriage.
3. That the Native Commissioner's judgment in regard to the cattle to be deducted was vague and indefinite.

This Court agrees that ground 3 of the Notice of Appeal is well taken as it was the duty of the Court below to have clarified the position and then to have given a definite judgment in terms of Rule 28 of the Native Commissioner's Court Rules. The Native Commissioner is referred to the case of Khotule *v.* Mabitsele, 1943 N.A.C. (T. & N.) 45. In view of what is being stated below it is not necessary to comment further on this aspect of the case.

The crux of the case is whether all the three esentials of a customary union are present as laid down in section 59 (1) of the Code. The three essentials are:—

(*a*) The consent of the father or guardian of the intended wife, which consent may not be withheld unreasonably;
(*b*) the consent of the father or kraal head of the intended husband should such be legally necessary.
(*c*) a declaration in public by the intended wife to the official witness at the celebration of the union that the union is with her own free will and consent.

There can be no doubt that the guardian of the girl Jemima gave his consent to the union. He states: "I have been asking defendant while Jemima was alive for them to register the marriage. My farther (since deceased) sent for defendant to return from Johannesburg to register the marriage". It cannot be imagined that the plaintiff, in view of this statement, could in any way have withheld the consent. There can be only one interpretation of this statement and that is that he had given his consent to the customary union.

It is not necessary to deal with essential (*b*) as defendant was a major and it was not necessary for him to obtain the consent of his father.

It is true that the registration of the union was not effected but as decided in the case of Ndhlovu *v.* Shongwe, 1940 N.A.C. (T. & N.) 66, registration is not an essential for a customary union and it is not clear from the Native Commissioner's reasons whether the fact that the customary union was not registered influenced him in declaring there was no legal marriage. He states "No. marriage between defendant and Jemima was ever registered. In fact, the whole of plaintiff's case seems to be based on the non-registration of the union.

Coming to the question whether a declaration in public was made by Jemima to the official witness, there can be no doubt that defendant and Jemima lived together for many years and she bore him 8 children. This was sufficient consent on her part but the question is whether she made a declaration in public to the official witness. Defendant states that a declaration was made and that the official witness was Mpeni who took ill and died before the marriage could be registered and he thereupon approached the Chief and informed him that the marriage was never registered. This was after 8 children had been born and lobolo had been paid. There is a dispute as to the number of cattle paid but that a certain number of cattle had been paid is admitted by the plaintiff who states that 5 head were paid and 5 were still due as lobolo. This statement is confirmation that a lobolo agreement had been made. Defendant states 9 head of cattle were paid and the Native Commissioner in his reasons states he was not able to decide how many had been paid.

Regarding the declaration made to the official witness Plaintiff states "I am not aware that Mpeni, the official witness, was paid 15s." This witness states "At no time did an official witness attend any ceremony or enquire of the parties." This witness goes on in his evidence and states "The girl was willing to marry defendant but he took no steps in the matter."

It is therefore clear that the only dispute is whether the official witness had put the question to the girl. All the other essentials are present and the case hangs on a very thin thread as to whether the official witness was present and had put the question to the woman who, it is not disputed, was willing to marry defendant. The Native Commissioner has not commented on the demeanour of the defendant or of his witness, who states that he was once the official witness and was succeeded by Mpeni. He further states defendant approached him to officiate at the marriage and that he referred defendant to Mpeni. In the case of Nxumalo *v.* Zulu, 1941 N.A.C. (T. & N.) 70, the facts were that the woman died and the official witness was dead. This Court held there was a customary union. The facts were very similar to those in the present case in which we have evidence that the official witness was present. All the presumptions of a marriage are present and these presumptions, in view of direct evidence by the defendant, have not been sufficiently rebutted and the defendant is entitled to judgment.

The appeal is allowed with costs and the Native Commissioner's judgment is altered to read:—

> "The appeal from the Chief's Court is allowed with costs and the Chief's judgment altered to read "For defendant with costs."

For Appellant: Mr. R. I. Darby of Darby and Higgs, Durban.
Respondent in default.

CASE No. 16 OF 1948.

NOZISHADA GUMEDE (Appellant) *v.* **BEKUKWENZA MBILI (Respondent).**

(N.A.C. Case No. 35/3/47.)

DURBAN: Monday, 26th July, 1948. Before Steenkamp, President, Tweedie and Bridle, Members of the Court (North-Eastern Division).

Practice and Procedure—Summons—Service of.

Held: Whatever defect might have existed in the service of a summons has been cured by the defendant appearing personally and not raising the point.

Appeal from the Court of the Native Commissioner, Port Shepstone.

Steenkamp, President (delivering the judgment of the Court):—

This case was placed on the roll for 27th January, 1948, but as there was no appearance for either appellant or respondent the case was struck off. Subsequently it transpired that the Registrar of this Court had erroneously advised the parties that the appeal would be heard on 27th February, 1948. This Court has now *mero motu* reinstated the case on the roll for to-day.

The plaintiff in suing for a divorce cited his wife, (1) Josephine Mbili d/a and (2) Nozishada, her father, as the defendants.

The mode of service endorsed on the back of the summons with a rubber stamp reads as follows:—

> "I certify that my deputy *W. Hufft on the 13th day of August,* 1947, served a copy of this summons on the within named defendant, by leaving same with *Nozishada Gumede* (*No.* 2 *defendant*), the person in charge of *their place of residence* (*Hebron*) to whom the nature of this process was explained."

The words in italics are written in ink. On the day of hearing first defendant (wife) was in default but defendant No. 2, her father appeared and pleaded that his daughter (defendant No. 1) left plaintiff because it was impossible to live with him as he continually assaulted her. The plea was also taken that there has been no service of the summons on the first defendant (wife) and that she has not been heard of from the day she left defendant No. 2's kraal to return to plaintiff and he has made every effort to find her but without success.

Evidence was heard and the Native Commissioner entered judgment as follows:—

> "Divorce granted. Wife to return to guardian and guardian to return 6 head of lobolo cattle. No order as to costs."

Defendant No. 2 (father) has noted an appeal to this Court on the following grounds:—

(1) The proceedings are irregular in that summons was never served on first defendant.
(2) The judgment is wrong in law and against the weight of evidence.

Counsel for appellant has advanced the following arguments:—

(*a*) Only one copy of the summons had been served and therefore it must be assumed that the copy intended for the wife was never served.

(*b*) The woman (defendant No. 1) was not under the father's control until she returned to his kraal and therefore service on him of the copy intended for her is not legal service.

It is not at all clear from the mode of service whether a copy of the summons intended for defendant No. 2 was served on him but there can be no doubt that the copy intended for defendant No. 1 (wife) was served because the endorsement reads that a copy was served by leaving same with Nozishada (defendant No. 2). If this copy had been intended for defendant No. 2 the words used would have been different and this Court does not lose sight of the fact that where personal service is effected on the defendant the endorsement will say so.

The point was not taken in the Court below that a copy of the summons had not been served on defendant No. 2 and it is too late to raise that now. Whatever defect might have existed has been cured by defendant No. 2 appearing personally and not raising the point.

The Deputy Messenger of the Court was called as a witness but his evidence relates solely to his unsuccessful endeavours to effect personal service on the first defendant. He was not questioned on the fact concerning service on defendant No. 2, nor was this apparently necessary as the latter was in Court and had not excepted to the service of his copy of the summons.

The next point taken in argument is whether service of the copy of the summons intended for defendant No. 1 could be served on defendant No. 2 seeing that she did not return to her protector's kraal after leaving the plaintiff.

Counsel has stressed that this case must be distinguised from that of Kambula *v.* Kambula, 1946 N.A.C. (T. & N.) 7 in which the wife did return to her father's kraal after leaving her husband. While there is some substance in the argument this Court holds the view that it cannot be overlooked, that it was the woman's duty to return to her father's kraal and her failing to do so should not militate against the husband obtaining redress. She has disappeared and after diligent search her whereabouts cannot be ascertained, and the only other alternative is for the husband to sue by Edictal Citation. As remarked in Kambula's case, such a course with a Native is usually a farce, for many of them cannot read and most of them do not read the papers. It is far more effective to bring the matter to the notice of the person most concerned, namely, the father, who stands to lose the lobolo which he holds for her.

Both the points taken in argument must be decided in favour of the respondent.

In so far as the merits of the case are concerned this Court is satisfied from the evidence that there was nothing to justify defendant No. 1 in leaving her husband's kraal after returning thereto in company with induna Fym and her action therefore constitutes wilful desertion.

The appeal is dismissed with costs.

For Appellant: Mr. R. I. Darby i.b. Forder, Ritch and Partners, Port Shepstone.
For Respondent: Mr. A. D. G. Clark i.b. Parry & Foulis, Port Shepstone.

SAAK No. 17 VAN 1948.

MARTINS MOETI (Appellant) teen PIET MAHLANGU (Respondent).

(N.A.C. Saak No. 58/1/48.)

PRETORIA: Maandag, 13 September 1948. Voor Steenkamp, President, Smithers en Bosman, Lede van die Hof (Noordoostelike Afdeling).

Deliktereg—Skade as gevolg van grasbrand—nalatigheid—erkenning.

Beslis.—Waar daar geen ander getuienis is om die verweerde s'n te weerlê nie, moet sy getuienis aangeneem word.

Appèl van die Hof van die Naturellekommissaris, Premiermyn.

Uitspraak van die Hof gelewer deur Steenkamp, President.

Die eiser het die verweerder gedagvaar vir die betaling van £100 synde vir skade deur hom gely deurdat verweerder wederregtelik en opsetlik versuim het om stappe te neem om 'n vuur wat deur hom aangesteek is, te blus.

Eiser beweer dat as gevolg van hierdie versuim, sy hutte, met die inhoud daarvan, vernietig is.

Verweerder het in sy pleit ontken dat hy die vuur aangesteek het en/of dat hy versuim het om dit te beheer, en ontken verder dat hy verantwoordelik is vir enige verlies wat die Eiser kon gely het.

Die Assistent-naturellekommissaris het uitspraak ten gunste van die Eiser gegee vir £100 met koste, en teen daardie uitspraak is 'n appèl aangeteken op gronde wat as gevolg opgesom kan word:—

(1) dat die Assistent-naturellekommissaris verkeerdelik gevind het dat die verweerder nie voldoende stappe geneem het om die vuur wat deur hom in die begin aangesteek is, te blus of te beheer nie;
(2) dat die Assistent-naturellekommissaris verkeerdelik gevind het dat die vuur wat deur die verweerder aangesteek is, die enigste bron is vanwaar die vuur na eiser se hutte kon sprei;
(3) dat die Assistent-naturellekommissaris verkeerdelik gevind het dat verweerder 'n kalf aangebied het as skadevergoeding;
(4) dat eiser nie daarin geslaag het om te bewys dat hy skade gely het tot 'n bedrag van £100 nie;
(5) dat die uitspraak teen die oorwig van die getuienis is.

Daar word nie betwis dat op die dag toe die eiser se hutte vernietig is, die verweerder gras by die watervoor waar hy werksaam was, aan die brand gesteek het nie, maar die verweerder verklaar dat die vuur behoorlik geblus was en dat hy daarna na sy eie hut gegaan het en verder dat hy geen kennis dra van die daaropvolgende vuur wat die skade berokken het nie, totdat hy teruggekeer het na die toneel, vergesel van mnr. Bester, wie waarskynlik die eienaar van die plaas is.

Dit word deur die eiser beweer dat toe die verweerder beskuldig word dat die skade deur hom veroorsaak is, hy skuld erken het en 'n kalf as vergoeding aangebied het en gesê het dat hy jammer was.

Die geskilpunte wat die verantwoordelikheid van die verweerder sal vasstel is gevolglik—

(*a*) of die skade veroorsaak is deur die vuur wat verweerder erken hy in die begin aangesteek het;
(*b*) of 'n tweede vuur voortgespruit het uit nalatigheid van verweerder deur nie die vuur wat in die begin deur hom aangesteek is, te blus nie; en
(*c*) of verweerder erken het dat hy verantwoordelik is vir die skade wat berokken is.

Met betrekking tot (*a*) het die verweerder aangevoer dat hy by die watervoor gewerk het van 7 tot 10 uur vm. op daardie dag en gedurende daardie tydperk het hy dit nodig gevind om gras vir ongeveer 40 tree te brand om hom in staat te stel om die voor skoon te maak. Hy het toe die vuur geblus en begin spit, maar deurdat die grond te hard was, het hy water in die voor gekeer en nadat hy ongeveer een uur gewag het, huistoe gegaan.

Volgens die getuienis van mnr. Bester, wie beskou kan word as 'n onpartydige getuie omrede dat hy ook self skade gely het deur die verlies van weiding, het die hutte van die eiser na 2.30 nm. toe hy op die toneel verskyn het, nog gebrand, en hierdie is die enigste getuienis wat beskikbaar is in verband met die vername vraagstuk van die tydperk.

Deurdat daar geen getuienis is om dié van die verweerder, naamlik dat hy die vuur behoorlik geblus het voordat hy daardie oggend huistoe gegaan het, te weerspreek nie, moet hierdie uitleg van hom aangeneem word.

Daar dien opgelet te word dat die verweerder se verklaring, naamlik dat hy daardie oggend terug na sy woonplek is deur die getuienis van mnr. Bester, wie hom na 2.30 nm. daar aangetref het, gestaaf word. Die hutte het toe nog gebrand, en dit kan aangeneem word dat 'n aansienlike tydperk verstryk het tussen die aansteek van die vuur in die begin, wat aangeneem moet word as geblus te gewees het tussen 9 en 10 uur vm., en die vuur wat die hutte vernietig het na 2.30 nm.

Die volgende geskilpunt wat oorweeg moet word is of daar 'n tweede vuur ontstaan het, en of die vuur wat deur die verweerder aangesteek is, versprei het nadat die verweerder terug is na sy hut. Dit wil voorkom dat 'n wind op daardie tydstip van oos na wes gewaai het en dat die grootte van die afgebrande stuk grond vanaf die watervoor gestrek het na Eiser se hutte wat ongeveer 900 tree daarvandaan is, en verby na die ooste, en het ook versprei na die westekant van die watervoor in die kamp vir 'n afstand van ongeveer 700 tree.

Dit is duidelik dat 'n gedeelte van hierdie vuur teen die wind op gebrand het en volgens die getuienis is dit nie moontlik om vas te stel van welke punt die vuur of vure begin is nie. Die Assistent-naturellekommissaris het in sy redes probeer

aantoon dat die vuur wat die hutte van die eiser vernietig het, verbind kan word met die vuur wat in die begin by die watervoor aangesteek is. Hy voer aan dat die smeulende oorblyfsels moontlik kon opvlam en dat as gevolg daarvan, 'n nuwe brand ontstaan het en ook dat deur die teenwoordigheid van 'n koppie en 'n spruit, daar moontlik lugstrominge teenwoordig kon wees en sodoende 'n verandering in die rigting van die vuur kon veroorsaak. Hierdie Hof vind geen getuienis wat hierdie afleidings regverdig nie en dit kan alleenlik aangeneem word as 'n paar van 'n menigte moontlikhede.

Alhoewel dit onnodig is om die moontlike oorsake te oorweeg van die tweede vuur buiten deur vas te stel of dit ontstaan het as gevolg van die vuur wat deur verweerder in die begin aangesteek is, kan geen getuienis, in die opinie van hierdie Hof, gevind word wat aangeneem kan word as bewys dat die latere vuur ontstaan het van die nalatigheid van die verweerder deur nie die eerste vuur behoorlik te blus nie.

Met verwysing na die beweerde erkenning is die enigste getuienis daardie van die die eiser en sy vrou, wie albei belanghebbende partye is. Mnr. Bester wie egter ook op daardie tydstip teenwoordig was, verklaar dat die verweerder nie verantwoordelikheid erken het nie.

Dit word beskou dat die getuienis in hierdie verband aansienlik opgeklaar kon gewees het gedurende die verhoor deur verdere vrae, maar dit is nie gedoen nie, en alhoewel mnr. Bester verklaar het dat die eiser alleen die aansteek van die vuur in die gras by die watervoor erken, was hy nie gevra in verband met die kalf wat as skadevergoeding aangebied is nie. Die verweerder se verklaring dat hy jammer gevoel het vir die eiser word beskou as 'n redelike uitlating onder die omstandighede, maar nie om noodwendig aangeneem te word as 'n erkenning nie, en hierdie Hof is gevolglik nie tevrede dat die verweerder 'n duidelike erkenning van verantwoordelikheid gemaak het nie.

Die Hof het die bepalings van artikel *ses-en-twintig* van Wet No. 13 van 1941 oorweeg, wat voorsiening maak dat ondanks die bepalings van enige ander Wet, word, wanneer in 'n geding onder hierdie Wet of die gemenereg, die vraag van nalatigheid in verband met skade deur veld- of bosbrand ontstaan, veronderstel dat daar nalatigheid was, tensy die teendeel bewys word, maar ons voel dat verweerder aan daardie bewyslas genoegsaam voldoen het toe hy verklaar het dat hy die vuur wat hy aangesteek het, behoorlik geblus het en dat hierdie verklaring deur geen getuienis weerspreek word nie.

Toe die vuur eenmaal deur verweerder geblus is, kan daar geen vraag oor die nalatigheid ontstaan nie, as die feit in aanmerking geneem word dat daar nie bewys is dat die vuur wat Eiser se hutte afgebrand het, 'n voortsetting is van die vuur wat deur verweerder aangesteek is nie.

Die appèl word toegestaan met koste en die uitspraak van die Assistent-naturellekommissaris word verander sodat dit lees „absolusie van die instansie met koste."

ADDENDUM.—Die appèl was 'n paar dae laat aangeteken, maar die Hof het *mero moto* die versuim gekondoneer.

Namens Appellant: Adv. de Villiers, i.o.v. Swanevelder, Hamersma en van Zyl, Pretoria.

Namens Respondent: Mev. Muller van H. A. Jensen, Pretoria.

CASE No. 18 OF 1948.

KOOS MATLI, C. B. MBOLEKWA AND P. MAHLATJE (Appellants) *v.* **KGOMO MASEMULA (Respondent).**

(N.A.C. Case No. 57/3/48.)

PRETORIA: Monday, 13th September, 1948. Before Steenkamp, President, Smithers and Bosman, Members of the Court (North-Eastern Division).

Practice and Procedure—Onus in defamation cases—Filing of notices in Native Appeal Court—Requirements of Rules 7 of Native Appeal Court Rules. Actions—Defamatory actions—Privileged occasions.

Held: That, in actions for defamation, a plea of a privileged occasion had been established by one party, then onus rests on the other party to show that there was malice or abuse of such privilege.

Appeal from the Court of the Native Commissioner, Pretoria.

Steenkamp, President (delivering the judgment of the Court):—

The plaintiff sued the defendants for £200 damages sustained as a result of defendants having on or about the 23rd April, 1947, wrongfully, unlawfully and maliciously published certain false and defamatory statements of and concerning the plaintiff. In the summons the names of the persons to whom publication was made are mentioned, and it is not necessary here to set out these names. It is alleged that the defamatory statements were contained in a memorandum submitted to the Native Advisory Board and that this memorandum had been signed by all three of the defendants.

It is not necessary to set out the full memorandum. The paragraphs complained against read as follows:—

"A meeting was held on the 8th April where I. B. Moroe, J. Tlolane, A. H. Sehloho, J. Choeu, K. Molefe, S. Nxu, Kgomo Masemula (the (plaintiff) and others addressed this meeting and there enticed the residents to stone or kill to death Messrs. de Vries, C. B. Mbolekwa (defendant 2) and A. M. P. Mahlatje, and alleged that they were traitors and were bribed by the P.U.T.C. at £200 each to put off the boycott. The very same night they also decided to raid the Superintendent's house, and a group of them went there at about 10 p.m."

"The attitude of this raid is unknown to us, whether it was for a peaceful purpose or to create some unpleasant incident, we cannot say. But we feel it was not for any peaceful purpose according to the information received from the Superintendent and others who went there as spies."

"It was at this meeting where some unpleasant incidents occurred. Statements of these incidents are in the hands of the Police and the C.I.D."

"On the 13th April, about 7.30 p.m., Mr. Mbolekwa was assaulted and aimed at being stabbed with a knife at his house by one Kenny Malebye. This being the outcome of the speeches made at the meetings of the 8th and 10th April."

"As members of this Board we feel greatly perturbed at such incidents, which aims and objects were to cause bloodshed, and even as far as causing deaths in our locations."

The defendants filed the following plea:—

(1) "First, second and third defendants are all members of the Pretoria Native Advisory Board, having been duly elected thereto in September, 1945, to hold office for a period of two years."

(2) "On or about the 14th day of April, 1947, at a meeting of the Committee of the said Board, defendants were duly appointed by Resolution of the said Committee to compile and submit to the said Committee a report or memorandum upon the boycott of the existing bus services to Atteridgeville Location, and upon all matters incidental or pertinent thereto including certain unrest and disorders amongst certain of the inhabitants of the said Location and all other matters arising directly or indirectly out of the said boycott."

(3) "Pursuant to the said Resolution and appointment, defendants compiled and signed a memorandum in the terms set forth in plaintiff's summons, which memorandum was, on or about the 15th day of April, 1947, submitted by defendants to the said Committee according to the directions of the said Resolution."

(4) "On the same day the said Committee duly resolved to submit the said memorandum to a full meeting of the said Board for consideration."

(5) "Pursuant thereto the said memorandum was duly submitted by the said Committee to a meeting of the full Board held on the 23rd April, 1947, the persons named on page 1 of plaintiff's summons being the members of the said Board present at such meeting."

(6) "Defendants deny that any portion of the said memorandum was defamatory of plaintiff; and they deny in particular that it conveyed or was intended to convey the meaning assigned thereto on page 4 of plaintiff's summons."

(7) "Alternatively, and should this Honourable Court find that any portion of the said memorandum was defamatory of plaintiff, defendants say that the contents thereof were true in substance and in fact and that it was in the public interest that they should be published to the said Committee and to the said Board."

(8) "Alternatively, defendants say that the occasion upon which the said memorandum was published to the said Committee and to the said Board was privileged by reason of the facts set out in paragraphs 1 to 5 hereof; that in publishing the memorandum as aforesaid, defendants acted in good faith and without malice and in the execution of their duty as members of the said Board."

(9) " Save as aforesaid defendants deny each and every allegation in plaintiff's summons contained, and deny in particular that plaintiff has suffered damages in the sum of £200 or any amount whatever."

At the request of the plaintiff, the following further particulars concerning the plea, were furnished:—

(1) " The Committee of the Board consists of the Native members of the Board having a Native Chairman and Deputy Chairman and a Secretary."

(2) " This Committee meets to compile matters for consideration of the Board to arrange its Agenda, and to give effect to its Resolutions."

(3) " The Committee is appointed by the Board and charged with the functions and duties already set forth."

(4) " Its members were Messrs:—

J. K. Matli, C. B. Mbolekwa, S. S. Kekana, S. D. Ligodi, I. B. Moroe, S. Modiselle, N. Mafola, A. M. Mahlatje, O. R. Moshe, H. S. Nkitle."

From the record it would appear that the three defendants at that time were members of the Advisory Board of the Atteridgeville Native Location, Pretoria district. A Native Advisory Board is properly constituted in terms of section twenty-one (1) of the Native Urban Areas Consolidation Act, No. 25 of 1945. The Defendants allege that they were appointed as a sub-committee by the caucus of the Native Advisory Board to investigate and furnish a report on the boycott of the bus services inaugurated for the residents of the Location. During the course of the proceedings in the Court below the question was raised as to whether the Sub-committee consisting of three members, had the power to investigate and report on any incidents that might occur in a Location. This question was, however, not pressed before this Court.

Counsel for appellants has, however, drawn the Court's attention to Government Notice No. 561 of the 12th December, 1925, in which the duties and functions of the Native Advisory Board are prescribed, and according to those regulations it is the duty of the Advisory Board to report on matters concerning the location. Apart from this, a statutory body like the Native Advisory Board has inherent authority to adopt any particular practice, failing a specific rule on the subject, to conduct its meetings, and for that matter, to appoint Sub-committees to report to the proper authority on any specific subject.

Nathan, in Volume III on the " Common Law of South Africa " in paragraph 1186, in quoting the case of Winterbach *v.* Worcester Municipality, 14 S.C. 351, states that " in the absence of regulations, the practice of a particular Town Council will govern the method of procedure ", and in the case before the Court there is evidence that the Municipality of Pretoria recognises and, in fact, encourages the Native Advisory Board to appoint Committees to investigate matters concerning the Location. The Advisory Board being a subsidiary body to the Municipality therefore also has the right to appoint a Caucus or Sub-committee to carry out investigations. From this it therefore follows that when the three defendants investigated and submitted a report they were legally not prevented from so doing, and such a report would be privileged, provided it conforms to the law of privilege as is understood in defamatory actions.

The Native Commissioner entered judgment for plaintiff for £10 and costs. It must be accepted that this judgment is meant to convey that the amount of damages is against the three defendants jointly and severally. Against this judgment an appeal has been noted in that the judgment is against the evidence and against the weight of evidence, and is bad in law on the following grounds:—

(*a*) " The learned Assistant Native Commissioner erred in holding that under defendants plea of privilege there was an onus upon the defendants to prove that the alleged defamatory statements were true.

(*b*) " Further with regard to first defendant (Koos Matli) the learned Assistant Native Commissioner erred in finding that the said defendant signed the alleged defamatory report recklessly and without reasonable grounds for believing the statements therein contained were true."

In so far as defendant No. 1 is concerned a notice of the abandonment of the judgment against him was filed with the Registrar of this Court on the day the appeal was set down for hearing. This notice does not comply with the requirements of Rule 7 of the Native Appeal Court Rules which states that a respondent may abandon the whole or any part of a judgment appealed against by the delivery to the Clerk of the Court wherein such judgment was given, of a notice to him setting forth the extent of such abandonment. It is further pre-

scribed what action the Clerk of the Court must take after having received the notice of abandonment, but it is observed there is no obligation to advise the Registrar of the Appeal Court. Counsel for appellants has admitted that he received the copy of the notice of abandonment on Saturday the 11th September, 1948, at a late hour, and by that time he had already been instructed to prosecute the appeal on behalf of all three appellants. No time limit is prescribed as to the number of days prior to the hearing of an appeal, the notice of abandonment must be served. The question of costs arises and this was actually argued by Counsel for appellant but in view of the conclusions this Court has arrived at on the merits of the case as against all three appellants who were cited together as defendants in the Court below, it is not necessary to give a ruling to which date the respondent is liable for costs incurred by the appellant No. 1.

Dealing with ground (*a*) of the notice of appeal, Counsel for respondent has conceded that after the defendants (appellants) had established the privileged occasion in which the alleged defamatory statement was made, the onus was then on the plaintiff to satisfy the Court that there was malice and abuse of the privileged occasion by the defendants; and that the onus was on the plaintiff to prove that the statements were false.

In the case of Hazaree *v.* Kamaludin, 1934 A.D. 108, it was held that a party upon whom the onus rests of proving that a defamatory statement made on a privileged occasion was made *animo injuriandi*, discharges such onus if he shows that the defendant's statement was untrue and that the defendant had no honest belief in its truth.

The Native Commissioner was therefore wrong in placing the onus on the defendants to prove that the allegations embodied in their report were true.

Ground (*b*) of the notice of appeal is against the judgment granted against defendant No. 1, but as this part of the judgment has been abandoned, the ground naturally falls away.

There now only remains the ground that the judgment is against the evidence and the weight of evidence.

If it were not for the fact that the Native Commissioner had placed the onus on the wrong party, then it would have been difficult for this Court to hold that the Native Commissioner had erred on the credibility of evidence. As remarked by Davis (A.J.A.) in the case of Rex *v.* Dhlmayo and Another, 1948, (2) S.A.L.R. 677 on page 705, the Appellate Court is very reluctant to upset the findings of the Trial Court but we find it remarked in the same case that where the Appellate Court is constrained to decide the case purely on the record, the question of onus becomes all important whether in a civil or criminal case.

Here we have a case in which the Native Commissioner has placed the onus on the wrong party and the question arises whether he would still have found for plaintiff if he had placed the onus on the correct party. In his reasons for judgment the Native Commissioner admits that in claims of this nature and particularly in view of the allegations contained in the pleadings, it is necessary that the all important question of onus should first be determined, i.e. on whom did the onus rest before any evidence was led. The Native Commissioner goes on in his reasons and states it is quite clear from the authorities (quoted by him) that at the outset the onus was on defendants to prove the truth of the statements contained in the report signed by them and that their alternatvie plea of truth and public interest and of privilege do not relieve them of the onus of proving the truth of the statements and therefore unless the defendants can discharge that onus, the plaintiff must succeed.

On this basis the Native Commissioner regarded the evidence of the plaintiff as being more reliable than that of the defendants and he came to the conclusion that the defendants had not discharged the onus which was on them to prove that the plaintiff had uttered the words at the meeting. He, however, does state at the end of his reasons for judgment that he believed the evidence of the plaintiff and disbelieved the defendants and their witnesses when they stated the plaintiff spoke at the meeting of the 8th April, 1947, being the date it is alleged the meeting was held where the plaintiff is alleged to have uttered the words embodied in the report submitted to the Advisory Board.

This Court must now examine the evidence to be able to hold whether or not the plaintiff has satisfactorily discharged the onus in proving that he did not utter the words and that the contents of the report are false.

It is admitted that a meeting was held in the location on the 8th April and that plaintiff was present at that meeting. This meeting was called to discuss the actions of the advisory Board in calling off the bus boycott. Plaintiff states he arrived when the meeting was already in progress and he did not speak. He

wants the Court to believe that the people at the meeting appeared quiet and there was no question of rioting and there was no shouting, yet he admits that about 9 p.m. the crowd moved off towards the Superintendent's office and veered off towards his house. He was in front of the crowd when they moved off from the meeting place to go to the Superintendent. Although plaintiff states this was before 9 p.m., we have the evidence of Superintendent de Vries that it was about 10 p.m. when the crowd met him while he was in his motor car. De Vries states the crowd was hostile towards him and rocked his car. They could only have shown such hostility as a result of what was said at the meeting and when the plaintiff testifies that the meeting was orderly, he cannot be believed. This casts a doubt on his evidence and as the onus was on him to prove the untruth of the allegations contained in the report, the Court must have a serious doubt as to his veracity. De Vries states that he did not want the people to go to his house, as his wife had just returned from the nursing home, and that plaintiff knew this. He therefore behaved discourteously towards de Vries. The Native Commissioner has not doubted de Vries' evidence and this Court attaches considerable weight to his evidence as to the incidents which occurred that night.

The defendants Nos. 2 and 3 state they were present at the meeting and that the contents of their report are correct. They are supported by one witness William Lefule whom the Native Commissioner states did not give his evidence very well. This is beside the point in view of the fact that the onus rested on the plaintiff. As pointed out above, the plaintiff's evidence was somewhat destroyed when he wanted the Court to believe that the meeting was orderly, whereas the incidents immediately thereafter were of such a nature that only one conclusion can be arrived at and that is that the people led by the plaintiff proceeded to the Superintendent's office or house (it is immaterial which it is) not with a friendly gesture but to cause a scene most alarming to the Superintendent and other well disposed people.

The plaintiff and defendants belong to different location political parties, and it has been argued that this is probably the cause of the trouble that led to the present action. This Court cannot subscribe to such views in favour of one side as against the other, and whatever political views the parties hold are questions which are no concern of a Court of Law.

We therefore hold the view that the plaintiff (respondent) has not discharged the onus which rested on him to prove that the contents of the report are false and the appeal is accordingly allowed with costs and the Native Commissioner's judgment is altered to read:—

" Absolution from the instance with costs ".

For Appellants: Adv. Jepson of Pretoria, i/b Macintosh, Cross & Farquharson of Pretoria.

For Respondent: Adv. Trengove of Pretoria, i/b H. A. Jensen of Pretoria.

CASE No. 19 OF 1948.

HLENGWANI MITILENE (Appellant) *v.* **JOHN MASIMEKE (Respondent).**

(N.A.C. Case No. 68/1/48.)

PRETORIA: Thursday, 16th September, 1948. Before Steenkamp, President, Holtzhausen and Bosman, Members of the Court (North-Eastern Division).

Practice and Procedure.—Application for recission of default judgment—nature of summons not explained—Defendant has a prima facie *case.*

Appeal from the Court of the Native Commissioner, Louis Trichardt.
Steenkamp, President (delivering the judgment of the Court):—

In this matter, default judgment was given against the appellant for the return to respondent of his wife, Modjadje, within thirty days of the 11th May, 1948, failing which, for the return to him of his lobola amounting to six (6) head of cattle or their value, £18, plus £13. 18s. in cash, with costs of suit.

Appellant applied for the rescission of the judgment, setting down his reasons as appear in his affidavit.

It is quite clear that the summons was served on him by the respondent, but from the evidence it is equally clear that the contents of the document were not explained to him, and for this reason alone, rescision should have been granted.

Further, appellant in his application has stated that he is not the guardian of respondent's wife and not liable for the return of the "lobola"—he has therefore made out a *prima facie* defence on the main issue.

Appeal allowed with costs and the Native Commissioner's judgment is altered to read—

"Default judgment rescinded. Costs to be costs in the cause."

For Appellant: Mr. Oeschger of Pretoria i/b Rooth and Coxwell of Louis Trichardt.

For Respondent: In person.

SELECTED DECISIONS

OF THE

NATIVE APPEAL COURT

(North-Eastern Division)

Qaurter ending 31st. December, 1948

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